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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

WAYMO, LLC,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. C 17-00939 WHA
	)	
UBER TECHNOLOGIES, INC.,	)	
et al.,	)	
	)	
Defendants.	)	
	)	San Francisco, California
		Wednesday, August 16, 2017

TRANSCRIPT OF UNSEALED PORTION OF PROCEEDINGS

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Official Reporter, U.S. District Court

(Appearances continued, next page)

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**Also Present:**

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Uber Director II, Litigation  
CHRISTINA SEKI  
JOHN L. COOPER, SPECIAL MASTER

1 **Wednesday, August 16, 2017**

8:00 a.m.

2 **UNSEALED PROCEEDINGS**3 **THE CLERK:** Calling Civil Action 17-939 WHA, it's Waymo LLC  
4 versus Uber Technologies Inc., et al. It's on for motions.5 Counsel, can you please come forward, state your appearances  
6 for the record.7 **MR. VERHOEVEN:** Good morning, Your Honor. Charles Verhoeven  
8 on behalf of Waymo. And with me are my colleagues James Judah,  
9 Jordan Jaffe and Melissa Baily.10 **THE COURT:** Great. Welcome to you.11 **MR. GONZÁLEZ:** Good morning, Your Honor. Arturo González  
12 from Morrison & Foerster. Also, Esther Chang and Michelle Yang.13 **THE COURT:** Welcome.14 **MS. DUNN:** Good morning, Your Honor. Karen Dunn for from  
15 Boies Schiller Flexner for Uber and Ottomotto. And with me is  
16 Meredith Dearborn.17 **THE COURT:** Welcome.18 **MR. CHATTERJEE:** Good morning, Your Honor, Neel Chatterjee  
19 of the Goodwin Procter law firm for Otto Trucking. And I'm  
20 flying solo.21 **THE COURT:** Thank you.22 **MS. BLUNSCHI:** Good morning, Your Honor. Melanie Blunschi  
23 from Latham & Watkins, on behalf of non-party Stroz Friedberg.24 **THE COURT:** Thank you.25 **MR. COOPER:** Good morning, Your Honor. John Cooper, special

1 master.

2 **THE COURT:** Good morning. Welcome to everybody, again.

3 So, we've got several motions here. The one that deals with  
4 the trade secrets and knocking out all the trade secrets, we'll  
5 do that last because I suspect we'll have to close the  
6 courtroom. We have other business we'll take up first.

7 There is a series of orders to show cause. And then there's  
8 a motion to strike damages. So we will deal with the order to  
9 show cause first.

10 Okay. Let's start.

11 **MR. VERHOEVEN:** Good morning, Your Honor. Charles Verhoeven  
12 on behalf of Waymo.

13 There are a number of submissions, Your Honor, that have  
14 been made in connection with our motion. The Court issued a OSC  
15 to Morrison & Foerster, to Stroz.

16 I want to deal with all those in one argument, unless the  
17 Court wants me to separate those out.

18 **THE COURT:** Let's start that way. Although I do have some  
19 specific questions, I can propound those in due course. Go  
20 ahead.

21 **MR. VERHOEVEN:** Okay. So first I want to address Uber and  
22 Morrison & Foerster's obligations and our contention that they  
23 are in contempt for violating two of the Court's orders.

24 It is undisputed here that -- I'm going to refer to Morrison  
25 & Foerster as "MoFo" just for the sake of brevity.

1       It's undisputed here that MoFo is Uber's agent. And that  
2 under Rule 65 of the Federal Rules of Civil Procedure, it's  
3 clear that injunctive orders against a party apply to that  
4 party's agents. The facts here show that MoFo has violated each  
5 of these two court orders.

6       Initially, and as Your Honor knows, the order dated March 16  
7 ordered production of documents, all documents -- all of the  
8 downloaded documents, which -- I'll just use the shorthand, the  
9 Levandowski-downloaded documents, and documents related thereto,  
10 by March 31.

11       And the Court's May preliminary injunction order ordered  
12 the same documents to be produced immediately.

13       MoFo has represented to this Court repeatedly that it did  
14 not have or that Uber didn't have any of the downloaded  
15 documents. Over and over, they represented that to the Court.

16       On June 2, we had a meet-and-confer testing that and probing  
17 that in front of the special master. And at that June 2  
18 meet-and-confer, Uber's counsel confirmed that Morrison &  
19 Foerster, in addition to the Uber, did not have any downloaded  
20 documents. We sent them a letter confirming that on June 2.

21       On June 5, Ms. Kim of MoFo submitted a declaration in  
22 opposition to this motion, stating, quote:

23               "MoFo does not have any downloaded materials or  
24 copies of experts or summaries thereof except to the  
25 extent that any such material may appear excerpted or

1 as an exhibit to the Stroz report, which is explained  
2 above as listed in our logs."

3 However, we learned on June 12th, from the Boies firm, from  
4 an email sending certain, quote, caveats and clarifications to  
5 the representation, that MoFo is now taking the position that in  
6 addition to the statement by Ms. Kim, they had documents -- they  
7 don't have documents, quote (As read) :

8 "....except to the extent that such material may  
9 appear in certain materials Levandowski and other  
10 persons provided to Stroz, to which MoFo was given  
11 limited access during the Stroz investigation."

12 So now we're learning a little bit more.

13 **THE COURT:** Help me understand how that differed from the  
14 statement about: Had no documents, except as per Stroz report.

15 **MR. VERHOEVEN:** I'll read you the whole quote. Quote --  
16 this is from the email sent from the Boies firm on June 2nd.  
17 And it is Paragraph No. 2.

18 Quote (As read) :

19 "MoFo does not have any downloaded materials or any  
20 copies, excerpts or summaries thereof, except to the  
21 extent that any such material may appear, 1,  
22 excerpted in or as an exhibit to the Stroz report..."

23 That is what they previous referenced.

24 "... and 2, in certain materials Levandowski and  
25 other persons provided to Stroz, to which MoFo was

1                   given limited access during the Stroz investigation."

2                   And it goes on.

3                   So, not only did they have the report and exhibits, but  
4                   they're saying they have additional materials that was given to  
5                   them.

6                   Then, Your Honor -- and these are more important facts -- on  
7                   June 28th -- so the order of March 16th ordered downloaded  
8                   materials. The May 11th preliminary injunction order, immediate  
9                   production of downloaded material.

10                  On June 28th, much later, Uber revealed for the first time  
11                  that its litigation support vendor, a company called Epiq, had  
12                  received a complete copy of the forensic images of Levandowski's  
13                  devices.

14                  So Stroz imaged Levandowski's devices, and on March 22,  
15                  2016, sent to MoFo's and Uber's litigation vendor a complete  
16                  copy of those forensic images.

17                  **THE COURT:** What was the name of that vendor?

18                  **MR. VERHOEVEN:** Epiq, E-P-I-Q. And I can read you the  
19                  quote, if you want.

20                  **THE COURT:** What are you reading from?

21                  **MR. VERHOEVEN:** I'm reading from the Docket 762,  
22                  supplemental accounting provided in response to the preliminary  
23                  injunction order, at Paragraph 4, and Pages 6 through 7.

24                  Shall I read it?

25                  **THE COURT:** Please. But what was the date of that, the

1 report?

2 **MR. VERHOEVEN:** The date of the report?

3 **THE COURT:** The June report that you are reading from.

4 **MR. VERHOEVEN:** Yes. That was June 28th, I believe. I have  
5 a copy, if Your Honor would like it.

6 **THE COURT:** I -- maybe, in a minute. But just go ahead.

7 **MR. VERHOEVEN:** Okay.

8 **THE COURT:** I want you to read it exactly.

9 **MR. VERHOEVEN:** Quote -- this is from Paragraph 4, 6 through  
10 7, quote:

11 "Stroz Friedberg received Anthony Levandowski's  
12 devices from Anthony Levandowski and imaged them on  
13 March 22, 2016, as part of the due diligence project.  
14 Stroz retained all personal devices except for  
15 Mr. Levandowski's phone. Stroz made and retained two  
16 copies of the forensic image. User-generated content  
17 was extracted and processed into a Relativity server  
18 for review, and the remaining content was evaluated  
19 by Stroz Friedberg's forensic teams. Two copies of  
20 the Relativity data were created: one was sent to  
21 John Gardner as counsel for Mr. Levandowski and the  
22 other was sent to Epiq at the request of Morrison &  
23 Foerster in its capacity as counsel for  
24 Mr. Levandowski in the *Google versus Levandowski and*  
25 *Ron* arbitrations and is currently being stored at

Epiq. "

So we learned on June 28th, for the very first time, that MoFo's litigation vendor and Uber's litigation vendor, both agents of Uber, had a complete copy of the forensic image from all of Levandowski's devices, Your Honor. We have been trying to get these documents since the very outset of this case. We still don't have them.

So this is an admission by Uber --

**THE COURT:** Wait. I want you to continue on, but explain how the issue in the Federal Circuit on -- that we've already decided here, and that is something on appeal, about the privilege, how that ties in to what Epiq was holding in its hands.

**MR. VERHOEVEN:** So there's two appeals. One's on the arbitration. The other one is on the diligence report and the Stroz subpoena.

And as Your Honor knows, both the Magistrate Judge and Your Honor ordered -- compelled production of the documents related to the diligence report, and the diligence report, itself.

Mr. Levandowski took an appeal, and the Federal Circuit ordered expedited discovery and stayed -- continued the stay Your Honor put in place on the effectiveness -- effectiveness of those orders.

There was a hearing last Friday before the Federal Circuit

1 that I argued. And so we're hoping to get a ruling at any -- at  
2 any point in time. But --

3 **THE COURT:** So let's say that the Federal Circuit affirms,  
4 in all respects. What will then happen with those Epiq  
5 documents?

6 **MR. VERHOEVEN:** Well, first, first let me say this,  
7 Your Honor.

8 This all -- this -- this privilege argument that's going to  
9 up to the Federal Circuit is irrelevant. Because what we're  
10 asking for is the Google documents that Mr. Levandowski took.  
11 And Uber and MoFo have never taken the position that those  
12 documents are protected by any privilege.

13 So the privilege issues go to the report, because they say  
14 the report is work product that was created. And that's what's  
15 going up. But the underlying documents that Mr. Levandowski  
16 gave to Stroz that are Google documents, that MoFo, Uber have  
17 never taken the position that those documents, themselves, are  
18 privileged. Nor could they.

19 So my first point, Your Honor, is they -- this privilege --  
20 you know, any privilege argument doesn't cover what we're --  
21 what the subject of this motion is, which is the Google  
22 documents.

23 **THE COURT:** Okay. Wait. I want you to -- if you go through  
24 everything, and then I give the other side a chance to talk,  
25 we'll never get back to the details.

1       **MR. VERHOEVEN:** Okay.

2       **THE COURT:** So you just stand right there.

3       I would like for somebody to answer this point about Epiq.

4       **MR. GONZÁLEZ:** So Your Honor, the answer to your question is  
5       that if the Federal Circuit affirms your ruling, they will get  
6       the documents that are at Epiq.

7       The documents that are at Stroz should be identical. It's  
8       basically an image of what Stroz had that was given to Epiq for  
9       purposes of litigation. They're a litigation vendor.

10      And the appeal will -- in fact, I should tell you this.  
11      We've already started to confer, which I think the Court will  
12      appreciate, about: What are we going to do if the Federal  
13      Circuit affirms? Because it's not just going to be a huge dump.  
14      There is some private information in there from Mr. Levandowski,  
15      photos of the kids, et cetera.

16      And so, how are we going to go through all of this  
17      information? We've already started those discussions.

18      But the answer to your question is: The Federal Circuit's  
19      ruling will make this moot. And counsel is wrong when he says  
20      there is no privilege at stake. Absolutely, there is. That is  
21      the whole point of the appeal.

22      Uber, to be clear -- I want this to be real clear -- Uber  
23      did not appeal Your Honor's ruling. Mr. Levandowski did. Under  
24      the Fifth Amendment. That's what was argued in the Federal  
25      Circuit. And it's not, Your Honor, just the Stroz report.

1       Mr. Levandowski's -- the subpoena that was served on Stroz  
2 is for all of their documents. And so that's what was argued in  
3 the Federal Circuit. Not just the Stroz report, but everything  
4 Stroz has.

5       And there's been a Fifth Amendment assertion by  
6 Mr. Levandowski, who, by the way, Your Honor knows is our former  
7 client. And so we're not in any position to give that stuff up.  
8 Just -- neither is Stroz, and neither is Epiq.

9       But when the Federal Circuit rules, we have already started  
10 to confer. They will have everything they have been wanting to  
11 see.

12       **THE COURT:** Now, to be clear, the way you pitched that --  
13 let's say there is an affirmance. Even if it's a copy, the Epiq  
14 materials are going to be turned over in addition to whatever  
15 Stroz and MoFo have, even if they are duplicates.

16       Correct?

17       **MR. GONZÁLEZ:** Yes. The criteria that we agreed to mutually  
18 for reviewing this information will be applied to that, as well.

19       **THE COURT:** But I don't want you to take the position that:  
20 Well, these must be duplicates, and therefore you don't have to  
21 produce the Epiq things. I promise you, I have lived too long.  
22 I've heard that argument, and there's always some mismatch.

23       So it would have to be you turn over the Epiq materials  
24 minus whatever you two have agreed on; you turn over the Stroz  
25 materials minus whatever you have agreed on; and you turn over

1 the MoFo materials minus whatever you have agreed on. And you  
2 do all three. You don't -- you don't think and indulge in the  
3 fallacious assumption that they might be identical. Even though  
4 they might be.

5 **MR. GONZÁLEZ:** I agree with that, Your Honor. Additionally,  
6 I want to make this note for the record: That we no longer  
7 control Epiq because we are no longer counsel in the  
8 arbitration.

9 But I will certainly communicate to Mr. Levandowski's  
10 counsel in the arbitration that that is your view, so that we  
11 can make sure that we apply the criteria to all the documents,  
12 including Epiq's.

13 **THE COURT:** Well, do you have -- well, at the time of these  
14 orders, Epiq was your agent. Right?

15 **MR. GONZÁLEZ:** Your Honor, I'm not trying to be cute, but  
16 I'm not recalling at this point exactly when we substituted out  
17 of the arbitration. It was within that time period.

18 But this is not going to be an issue, Your Honor. This is  
19 not going to be an issue. We will apply the criteria to Epiq's  
20 documents.

21 **THE COURT:** Okay. Just stand right there.

22 Now, what's wrong with what I just heard, Mr. Verhoeven?

23 **MR. VERHOEVEN:** First, Your Honor, Mr. González may say this  
24 is attorney argument, but in fact, in the briefings, all the way  
25 up to the Federal Circuit, the defendants have never taken the

1 position that the actual documents, the Google documents, the  
2 stolen documents, are covered by any privilege.

3 **THE COURT:** Well, that's not the same thing as disavowing a  
4 privilege. What do you mean?

5 Have they ever conceded that they weren't privileged?

6 **MR. VERHOEVEN:** They've been ordered to produce those  
7 documents, Your Honor. And they have not. That's our point.  
8 And they haven't claimed privilege on those exact documents.

9 And, and, you know, Your Honor asked in the OSC to MoFo, to,  
10 quote:

11 "Explain what controlling authority allows someone to  
12 knowingly receive and keep suspected stolen property,  
13 despite a demand or order that it be returned to its  
14 rightful owner."

15 And Stroz's response to that is, quote:

16 "Stroz has been unable to identify any controlling  
17 authority addressing the issues raised in the order  
18 to show cause under the facts presented in this  
19 case."

20 MoFo's response to that was to fail to show any such  
21 controlling authority. And they made some other arguments that  
22 didn't answer Your Honor's question.

23 Clearly, if you're an attorney, and you're aware that you  
24 possess or your agent possesses stolen documents, it's your duty  
25 to produce those stolen documents, even without a court order.

1 For example, the California Penal Code, Section 496(a),  
2 quote:

3 "Every person who buys or receives any property that  
4 has been stolen..."

5 And then it goes on:

6 "...or withholds..."

7 And then it goes on:

8 "... any property from the owner shall be punished by  
9 imprisonment."

10 I mean, everybody should know this. It is in the ethical  
11 rules for lawyers. If you are aware that you have stolen  
12 material, you need to disclose it. You need to produce it.

13 And we have been asking since the outset of this case for  
14 them to produce these stolen documents. We have been asking:  
15 Do you have them? You need to produce them.

16 I sent a letter to Mr. Jacobs right at the start of the  
17 case, specifically asking about just the documents, and saying:  
18 You need to produce those because you don't have a right to keep  
19 stolen property. And I asked him specific questions about that.  
20 Never even got a response, Your Honor.

21 So, this is what we're complaining about. And we have been  
22 severely prejudiced, because we still don't know the story,  
23 because these documents have been withheld, even though they  
24 don't claim privilege over them, and even though the Court has  
25 repeatedly ordered that they produce the stolen documents.

1       Otherwise known as "the downloaded materials," Your Honor.

2           From the very first order in this case that you issued on  
3       March 16th, you ordered that the defendants produce the  
4       downloaded materials. And they've had them as of that time, and  
5       have not produced them, all the way up to today, Your Honor.

6       **THE COURT:** But, why -- why does -- Mr. González made the  
7       point that in the Federal Circuit, there's a pending issue of  
8       privilege. So let's take it one step at a time.

9           As to the documents in MoFo's immediate possession and  
10       Stroz's possession -- by "privilege," I mean Fifth-Amendment  
11       privilege -- that once that -- if that goes against you, then  
12       what's the answer?

13           If the Federal Circuit holds that those are privileged under  
14       the Fifth Amendment and need not be produced, what do you do  
15       with that ruling?

16       **MR. VERHOEVEN:** Well, I go back and point out to the Court  
17       that no privilege has been asserted over the stolen documents.

18           And the Fifth Amendment is like a footnote that -- that  
19       Levandowski urges on the Court. It was already ruled on by Your  
20       Honor. It already went up on mandamus; it was rejected.

21           You remember the privilege log identity issue?

22       **THE COURT:** Yes, and maybe they're going to affirm. But  
23       let's say they disagree with the judge, and they say: No, the  
24       Fifth Amendment does apply.

25           What are we going to do then?

1           **MR. VERHOEVEN:** The Fifth Amendment -- Your Honor, the Fifth  
2 Amendment doesn't apply to entities like MoFo over which  
3 Levandowski has no control. It's black --

4           **THE COURT:** But if the Federal Circuit says it does --

5           **MR. GONZÁLEZ:** You have addressed the --

6           **MR. VERHOEVEN:** Theoretically, Your Honor, the Federal  
7 Circuit could say that Google's stolen documents are privileged.  
8 But they are not going to. And --

9           **THE COURT:** Well, I'm so glad that you are confident.

10          **MR. VERHOEVEN:** Well, I am confident. Because that's the  
11 law.

12          **THE COURT:** Oh, I -- I think you're right, but I -- I don't  
13 know.

14          What were you about to say, Mr. González?

15          **MR. GONZÁLEZ:** Your Honor, you have already addressed the  
16 question of what happens if the Federal Circuit says they are  
17 privileged.

18          The answer is that under *Hubbell* and *Fisher*, it would be  
19 inappropriate for the lawyer to give up information that the  
20 lawyer received from the client for the purpose of representing  
21 the client.

22          **THE COURT:** Well, maybe. Now, why -- why did you ever  
23 identify and assert privilege over the Epiq documents? How did  
24 we get into that mess?

25          **MR. GONZÁLEZ:** Your Honor, Epiq did not receive the

1 documents until after the arbitration was filed. Epiq is just a  
2 vendor. It's like -- we're both using vendors right now in this  
3 litigation to help us with documents. Epiq was going to play  
4 that role in the arbitration. That is the only reason they  
5 received the information.

6 **THE COURT:** Yeah, but why didn't you identify those up  
7 front, and then claim privilege over them?

8 Mr. Verhoeven's point is you have waived it by not  
9 identifying them and claiming privilege, and you let it slip by  
10 until way late in the game.

11 **MR. GONZÁLEZ:** So, Your Honor, the documents that we have  
12 identified already, this is not a secret. This is the Stroz  
13 information that we've been fighting about from the outset.

14 **THE COURT:** But now, now you're going over the -- indulging  
15 the assumption that they're the identical documents.

16 **MR. GONZÁLEZ:** Counsel, himself, just said, Your Honor, they  
17 made two images.

18 **THE COURT:** I don't know. I don't know if they did or not  
19 Until you see it and I see it, we don't know that's true.  
20 Probably different, in my view. In some minor ways, they're  
21 different.

22 **MR. VERHOEVEN:** Your Honor, there's another disclosure in  
23 addition to this one that we just learned about, that I think  
24 the Court should also know about when ruling on this.

25 And that is -- so the last disclosure was June 28th. Then

1 on July 12th, Uber admitted for the first time that MoFo, the  
2 firm -- not Epiq -- MoFo possesses a copy of the downloaded  
3 materials that Stroz sent to it in March 17th.

4 This is admitted by MoFo's attorney, Eric Tate, in  
5 Paragraph 6 of MoFo's response to Your Honor's order to show  
6 cause.

7 So the very first time they disclosed this was on the due  
8 date of their reply to Your Honor's order to show cause.

9 **THE COURT:** Wait a minute. You're talking, you're saying  
10 that in addition to the Epiq, --

11 **MR. VERHOEVEN:** Yes.

12 **THE COURT:** -- Eric Tate at MoFo has documents too.

13 **MR. VERHOEVEN:** I'll read from his declaration, Your Honor.

14 **THE COURT:** Read it to me out loud.

15 **MR. VERHOEVEN:** Quote (As read) :

16 "As part of our representation of Mr. Levandowski in  
17 those arbitration matters, Mr. Levandowski authorized  
18 Stroz to release the materials in his possession to  
19 our firm, to provide them with counsel, and to  
20 respond to discovery obligations. In March, 2017, we  
21 received some materials from Stroz (not all of them),  
22 and began review of these materials before  
23 Mr. Levandowski retained separate counsel."

24 And I will tell you I looked at the dates there, and this  
25 declaration doesn't specify when in March. I think that's

1 notable. It just says they received them in March. But MoFo  
2 withdrew from representation in the arbitration on April 25.

3 So this review that he admits was going on at MoFo of the  
4 downloaded documents was conducted, at least by their own  
5 admission, for over a month. At the start of this litigation.

6 There's no excuse for them not telling us about these  
7 documents, if they had them. They were reviewing them.

8 This was something that was intentionally withheld,  
9 Your Honor. Even though there was no claim that the Google  
10 documents, themselves, were subject to any sort of privilege.

11 **THE COURT:** What do you say to that?

12 **MR. GONZÁLEZ:** So, Your Honor, with respect to that, it's  
13 similar to the information about the consultant. We're talking  
14 now about documents that MoFo received during the course of the  
15 litigation.

16 Our focus in responding to your order was to try to find  
17 everybody who may have had any information about these documents  
18 during the entire due diligence period.

19 Remember the issue is substantial compliance. We  
20 interviewed more than 200 people, Your Honor, in order to come  
21 up with information that was responsive.

22 What he's talking about right now, to be clear, he says we  
23 have the downloaded material and that we reviewed the stuff for  
24 a month. Wrong. We do not have the downloaded material. We  
25 have some information from Stroz. We did not review it for a

1 month.

2 One associate, Your Honor, one associate reviewed some of  
3 this information for a few hours, one day. And I don't mind  
4 telling you that I pulled the plug on that when it became clear  
5 that there was a conflict developing, and that Mr. Levandowski  
6 was going to have to get separate counsel. That's all that  
7 happened.

8 During the litigation --

9 **THE COURT:** What happened to those documents?

10 **MR. GONZÁLEZ:** They're still at MoFo. They are still at  
11 MoFo, Your Honor.

12 **THE COURT:** How big a set is that?

13 **MR. GONZÁLEZ:** Your Honor, it's -- it's a fraction of what  
14 is at Stroz that we started to review. And I need to be careful  
15 on that; I don't want anybody to argue that I'm waiving  
16 something here. There's been a lot of allegations about waiver  
17 here.

18 **THE COURT:** There's not a waiver. It won't be a waiver to  
19 describe the volume that MoFo has.

20 **MR. GONZÁLEZ:** Your Honor, we have tens of thousands of  
21 documents. But I don't even want to use the word "documents"  
22 because even that is not accurate.

23 **THE COURT:** Tens of thousands of documents that came from  
24 Levandowski, that came from Google?

25 **MR. GONZÁLEZ:** No. That's the point, Your Honor. That's

1 the point. This is information from Mr. Levandowski that went  
2 to Stroz.

3 To be clear, this is what I think the Court maybe doesn't  
4 understand. And he just read it into the record, so I want to  
5 repeat it.

6 What happened, Your Honor, is that Stroz took all of  
7 Mr. Levandowski's devices, even devices that were very old, and  
8 put it all into a vault. And the only thing he got back was his  
9 phone.

10 And this is why I said to you the first day I walked in here  
11 that I was confident that this stuff is not at Uber because we  
12 vaulted it all.

13 We have a sliver of that information, Your Honor. And I  
14 don't want to get into too many specifics because they'll argue  
15 waiver. And we got that during the course of this litigation.

16 **THE COURT:** Well, how are you going to get it in front of  
17 the jury if you don't want to --

18 **MR. GONZÁLEZ:** Oh --

19 **THE COURT:** You're just trying to hide in the weeds.

20 **MR. GONZÁLEZ:** No. No, no, no. Let's be clear, Your Honor.

21 **THE COURT:** Save it for the jury --

22 **MR. GONZÁLEZ:** No, no.

23 **THE COURT:** If you're going to use it at all, you ought to  
24 tell me now.

25 **MR. GONZÁLEZ:** No. The information that we have, we don't

1 plan to use at all, is information that we received while we  
2 represented Mr. Levandowski in the arbitration. And the only  
3 reason we are withholding it, Your Honor, is because -- the same  
4 reason we've already discussed. Mr. Levandowski has informed us  
5 in writing that he's asserting his rights which you've  
6 acknowledged that he has under *Hubbell* and *Fisher*.

7 And we've already made it clear that as soon as the Federal  
8 Circuit rules, this information will be reviewed pursuant to  
9 whatever protocol we agree to, and it will be produced.

10 But to be clear, we're talking about Mr. Levandowski's  
11 information that he gave us when we were his lawyers in the  
12 arbitration to represent him. And he is the person who is  
13 objecting to their production.

14 And you probably don't need to hear from him, Your Honor,  
15 but I brought the general counsel from our firm to make that  
16 point, if need be.

17 **MR. VERHOEVEN:** May I respond, Your Honor?

18 **THE COURT:** Sure.

19 **MR. VERHOEVEN:** First of all, what we're -- we have  
20 repeatedly asked specifically for the Google documents. Not all  
21 the Stroz documents -- we've asked for that, too. But, the  
22 Google documents that Mr. Levandowski has. We've said: Do you  
23 have it? Do you have it? And they've refused to even answer  
24 the question.

25 And when they did answer the question, all the way up until

1 June, they said they didn't have it. They said MoFo didn't have  
2 it. That was false. And that's not a Fifth Amendment issue.  
3 That is not protected by the Fifth Amendment, whether or not  
4 MoFo has the Google stolen documents.

5 They did, and they didn't tell us, intentionally, until they  
6 were forced to. When we finally battered them down after, you  
7 know, a dozen motions, and then they had to respond to the  
8 preliminary injunction order, they finally admitted it. And  
9 then, in response to Your Honor's order to show cause, they did  
10 it some more.

11 This stuff, they had a duty to disclose under Your Honor's  
12 March 16th order, and they did not do that. They didn't even  
13 identify whether they had any.

14 So --

15 **THE COURT:** So let's say there's -- what would -- what good  
16 would holding somebody in contempt do?

17 **MR. VERHOEVEN:** Well, first of all, we were prejudiced  
18 because we didn't know anything about this for the preliminary  
19 injunction order. They remained completely silent, and did not  
20 disclose to the Court that they had Google's stolen documents,  
21 in response to our preliminary injunction motion.

22 We first learned about it late in the discovery period. On  
23 the -- for example, on the July 28th -- I think that was the  
24 date -- disclosure, we were talking about 20 days until the  
25 discovery cutoff. We can't even serve document requests. It's

1 too late for that.

2 I mean, there's some severe prejudice to Waymo from their  
3 gamesmanship of hiding behind --

4 **THE COURT:** But, but if the Federal Circuit affirms, then I  
5 understand Mr. González to say that any and all of the  
6 downloaded documents will be turned over by MoFo, Epiq, Stroz,  
7 and without question, they will be turned over. You don't have  
8 to have another document request.

9 Am I right about that?

10 **MR. GONZÁLEZ:** Yes. We made that clear.

11 **THE COURT:** So what --

12 **MR. VERHOEVEN:** They have represented that they will produce  
13 things, and have not produced them, repeatedly in this case  
14 Your Honor, number one.

15 Number two, next week is the last week until the discovery  
16 cutoff.

17 **THE COURT:** Well, okay, but I also said that if any new  
18 documents get produced, you get to go back and depose -- within  
19 reason, you get to get back and depose everyone in sight, and do  
20 it all over again, because it was their fault. They wrongly hid  
21 behind some privilege. And you get to go and redepose people on  
22 those documents. Even though it's after the cutoff.

23 **MR. VERHOEVEN:** So say there's -- I think 20 percent of  
24 their privilege log is implicated. Their privilege log is 3,500  
25 items. As well as the Stroz production, as well as the

1 documents that were hidden by the Morrison & Foerster firm.  
2 That's going to be thousands and thousands of documents. We're  
3 going to have to do probably a dozen depositions.

4 **THE COURT:** Good.

5 **MR. VERHOEVEN:** We've got an October trial date, Your Honor.  
6 And that gets in peril. We'll have to make a Hobson's choice:  
7 Do we keep the trial date? Or do we pursue this discovery that  
8 was withheld, under significant prejudice to us, in this  
9 gamesmanship of not even telling us about these documents?

10 And by the way, the identity of the people holding the  
11 stolen documents went up to the Federal Circuit. That was the  
12 idea about the privilege log where Levandowski was saying he  
13 shouldn't even have to identify Stroz. The person who had the  
14 documents.

15 And Your Honor said: Yes, you do. And it went up on the  
16 Federal Circuit. And the Federal Circuit rejected that,  
17 already.

18 So the notion that they didn't have an obligation to  
19 disclose that Morrison & Foerster had the downloaded documents,  
20 that Stroz had the downloaded documents --

21 **THE COURT:** Okay. One possibility -- I'm not ruling this  
22 yet. But one possibility that I found in other cases is  
23 efficacious for the good of the system is -- I am concerned that  
24 Mr. González failed to disclose that he had the documents. And  
25 it took a long time to come clean. Maybe he can get on the

1 stand and explain it away.

2 But I am inclined -- but I won't rule that yet -- to tell  
3 the jury exactly this scenario. That he was ordered to come  
4 clean, did not come clean. Ordered to come clean again, did not  
5 come clean. And finally, in June and July, comes clean.

6 These big firms, these big companies, they -- I can't  
7 regulate everything, but I can do this. I can tell the jury  
8 what they're up against, what we're up against in this -- this  
9 -- where people hide the ball.

10 I don't know if Mr. González -- I know Mr. González. He is  
11 an honorable guy. Maybe his firm did this; maybe Uber did it.  
12 I don't know.

13 But I'm inclined to let the jury know what happened here.  
14 And they can take this into account in evaluating the bona fides  
15 of both sides here.

16 **MR. VERHOEVEN:** Your Honor, that would be --

17 **THE COURT:** I'm not saying I'm going to do that yet, but  
18 that's the relief that I think is more likely to do some good  
19 than just saying somebody's in contempt.

20 **MR. VERHOEVEN:** Your Honor, that would be acceptable to  
21 Waymo.

22 **THE COURT:** What's wrong with that, Mr. Gonzalez?

23 **MR. GONZÁLEZ:** Well, Your Honor, I've just been standing  
24 here listening. And now you've bought into a completely false  
25 premise.

1           **THE COURT:** No --

2           **MR. GONZÁLEZ:** No, no.

3           **THE COURT:** It's true that you misled the Court.

4           **MR. GONZÁLEZ:** No, Your Honor --

5           **THE COURT:** You misled the judge time and time again. And  
6 it wasn't until I sent out that order directly to MoFo that you  
7 came clean. That's true.

8           **MR. GONZÁLEZ:** Your Honor, the notion that Morrison &  
9 Foerster has the stolen documents or ever had the stolen  
10 documents is completely baseless.

11          You, right now, believe in your heart that we've got this  
12 vault of the 14,000 documents. Now, I am limited in what I can  
13 tell you, by Mr. Levandowski's assertion of *Hubbell* and *Fisher*.

14          But here's what I want you to know: There will never be a  
15 day, never, no matter what the Federal Circuit rules, when  
16 anybody proves that MoFo was hiding, or for that matter, that  
17 Uber was hiding the 14,000 documents.

18          This is much ado about nothing --

19          **THE COURT:** You had something. You, yourself, came clean  
20 and said you had something.

21          **MR. GONZÁLEZ:** Sure, we have something that came from all of  
22 these devices that Mr. Levandowski has had for probably more  
23 than a decade.

24          **THE COURT:** And that fact was hidden from the judge, despite  
25 many inquiries.

1           **MR. GONZÁLEZ:** Well, Your Honor, we're talking about  
2 information that we received during the course of this  
3 litigation. There is no reason for us to hide that. We're not  
4 trying to -- this is not gamesmanship. This is -- this is a  
5 small sliver.

6           **THE COURT:** You will be a good witness. You'll be right up  
7 there explaining to the jury this story.

8           **MR. GONZÁLEZ:** Your Honor --

9           **THE COURT:** And then Mr. Verhoeven will get to cross-examine  
10 you, and show that the judge ordered you to come clean, and you  
11 didn't.

12           What are you going to say? You going to give me that --  
13 give the jury that kind of a speech?

14           **MR. GONZÁLEZ:** Oh no, Your Honor. When the Federal Circuit  
15 makes a ruling, there's a whole lot that Uber's been dying to  
16 say that we'll say. And it will be very clear: There's no  
17 "there" there.

18           **THE COURT:** So the scales are going to fall from our eyes  
19 and -- but it does seem to me that you were ordered twice, once  
20 in March and once at a later date, to produce the downloaded  
21 materials in your possession, and if they had been destroyed, to  
22 explain it.

23           Silence from MoFo and Uber, until we get to the month of  
24 June. And then, then it starts to dribble out that you, in  
25 fact, had copies of what had come from -- from Mr. Levandowski.

1       So, I have a feeling that Mr. Verhoeven is going to be able  
2 to show -- maybe not, but he's going to be able to show that  
3 some of those files are the same ones that were downloaded, and  
4 that certainly they came from Google. And that the first time  
5 that I learned about that was in June.

6       And on a case -- so, so, yeah, you could get on the stand,  
7 and put your assistants on the stand, and explain to the jury  
8 how come that wasn't revealed until much later.

9       But, I'm not ruling this yet. I'm just saying that's the  
10 way I'm inclined. And I think it's best to wait until the  
11 Federal Circuit rules, and maybe we'll see what these documents  
12 are.

13       And, you know, conceivably, Mr. González is going to -- it's  
14 going to look -- it's going to be amazing. We're going to find  
15 out maybe that what he's been trying to hide from us is not the  
16 downloaded documents. He's been trying to hide something else.  
17 And so that this will all be moot.

18       **MR. GONZÁLEZ:** And it's not even, Your Honor, a matter of  
19 hiding anything. Two things -- two things, Your Honor, that you  
20 need to know.

21       Number one, this trial is going to be against Uber. Uber,  
22 to be clear, didn't even know that MoFo had these documents  
23 until the day before we filed that declaration. Uber didn't  
24 even know. Because again, Your Honor, you have got to put this  
25 in context. We received some documents during the arbitration,

1 way back in March. One associate spends a few hours reviewing  
2 them, and then I pull the plug.

3 And by the way, I've stated, but I want to say it again,  
4 because I heard you again say Your Honor, "downloaded  
5 materials." When the light shines, the Federal Circuit rules,  
6 and we're no longer concerned about being sued for something,  
7 now we can disclose the fact those downloaded materials are not  
8 at MoFo. All I'm going to say.

9 The downloaded materials are not at MoFo, and Uber never  
10 even knew we had these documents. So we're jumping way far  
11 afield.

12 **THE COURT:** Well, what documents did you -- I know from the  
13 record that MoFo, back when the deal was being done, reviewed  
14 something.

15 **MR. GONZÁLEZ:** Yes.

16 **THE COURT:** And the something came from Levandowski.

17 **MR. GONZÁLEZ:** Yes.

18 **THE COURT:** And there's strong suggestions that they were  
19 Google documents.

20 **MR. GONZÁLEZ:** So, Your Honor, that is the Stroz report and  
21 the Stroz exhibits that we've already discussed many, many  
22 times.

23 I've said it before, but I need to say it again: When you  
24 ruled that that information should be disclosed, Uber did not  
25 appeal that ruling.

1       So Uber stands ready to produce that information. And they  
2 have been ready for a long time, because at the end of the day,  
3 Uber believes strongly that that information is going to help  
4 us.

5       **MR. VERHOEVEN:** May I respond, Your Honor, briefly?

6       **THE COURT:** Yes, but we've got to move on.

7       **MR. VERHOEVEN:** Yes.

8       **THE COURT:** You --

9       **MR. VERHOEVEN:** So, very briefly, this is a complete  
10 violation of the sword and shield doctrine. Counsel is  
11 representing what these documents say, while at the same time  
12 withholding them as privileged, Your Honor. That's totally  
13 inappropriate argument. If you're going to make representations  
14 about these documents, then produce them. But they've withheld  
15 them.

16       And the Court shouldn't even consider arguments about what  
17 they say, because they have been's withheld, and considering it  
18 would be a violation of the sword and shield doctrine.

19       Second, we're not just talking about the Stroz report and  
20 exhibits. What I read to you shows, by their own admission,  
21 their own documents, and their own declarations, that they have  
22 an image of the forensic -- a forensic image of all of  
23 Levandowski's devices, his personal devices. They have a copy  
24 in a database called "Relativity database." And they can use a  
25 client Relativity viewer to look at all of those documents.

1       Today, someone at MoFo can goon to the Relativity  
2 application that Epiq has for them, and search the forensic  
3 images of Levandowski's files. So they -- and that's been the  
4 case since the outset of this litigation, Your Honor.

5       And so the representation that they're not hiding something,  
6 MoFo didn't fail to disclose something important, is without  
7 merit.

8       **THE COURT:** Here's one thing that would be useful to me.  
9 After the hearing, I would like for Waymo to write out a  
10 proposed jury instruction that would say in non-argumentative  
11 terms what happened on this whole sequence in chronological  
12 order, so that we can begin the process of considering whether  
13 to give such an instruction to the jury. And then give that to  
14 the other side.

15       And in due course, the judge is going to decide whether to  
16 give some instruction along those lines. I have not decided  
17 that yet. But that does seem to be the most likely, if any,  
18 relief. I have not decided that yet.

19       I would like for whoever it is that represents Stroz to come  
20 forward, please. I have a related question. And, please state  
21 your name again.

22       **MS. BLUNSCHI:** Good morning, Your Honor. Melanie Blunschi  
23 on behalf of Stroz.

24       **THE COURT:** Going by my list here -- oh, yes, you say  
25 Melanie?

1       **MS. BLUNSCHI:** That's me yes. We recently substituted.

2       **THE COURT:** Blunschi, Blunschi?

3       **MS. BLUNSCHI:** Yeah.

4       **THE COURT:** Okay. All right. Here's my question: If the  
5       Federal Circuit affirms, is Stroz going to turn over any and  
6       everything that it received from Levandowski and that it has in  
7       its possession?

8       Or are you going to further litigate over some contractual  
9       duty that you've referenced in your paperwork?

10       So, I want to -- your paperwork is not clear. I understand  
11       that you're relying on privilege, the Fifth Amendment thing.

12       But let's assume for the sake of argument that the Federal  
13       Circuit affirms in total. So tell me what your position is  
14       going to be then.

15       **MS. BLUNSCHI:** If the Federal Circuit affirms, Stroz will  
16       produce all of the materials that were provided to it in the  
17       course of the due-diligence investigation. As well as other  
18       responsive materials to the subpoena.

19       We have been working with the special master and the parties  
20       and the intervenors to figure out the best protocol for handing  
21       over such a large volume of material.

22       But, we are not going to further litigate any contractual  
23       obligations.

24       **THE COURT:** All right. That helps me understand that.  
25       Thank you. All right. That's all, the only question I had for

1 you.

2 **MS. BLUNSCHI:** All right. Anything further on the OSC to us  
3 this morning?

4 **THE COURT:** Nothing further now. But please don't go away.  
5 Stay for the rest of the hearing.

6 **MS. BLUNSCHI:** Absolutely.

7 **THE COURT:** Okay. Thank you.

8 Now, let's -- there's a piece of this OSC that I want to  
9 make sure I have in mind. That is the destruction of five  
10 disks, and the disclosure of that.

11 So tell me your -- you summarize that position.

12 **MR. VERHOEVEN:** Sure. There's two -- there's two things  
13 that were withheld regarding the destruction of documents.  
14 First, the destruction of five disks that contained Google  
15 material.

16 But secondly, a March 29 deposition admission and August 4th  
17 declaration admission that Uber, including Uber's CEO and senior  
18 vice-president and the in-house counsel responsible for this  
19 case were made aware in March that Mr. Levandowski allegedly  
20 destroyed -- allegedly admitted that he downloaded materials,  
21 but then represented that he destroyed them. So that's the  
22 second, a second piece of the puzzle. So let me go in more  
23 detail.

24 The Court's order stated -- and I'll just summarize, I won't  
25 take the time to read it -- the defendant needed to report any

1 destruction of downloaded materials by March 31st. The Court's  
2 very first order on March 16th. Nothing was reported. Zero.

3 It wasn't until June 8th, in an interrogatory response, that  
4 Uber belatedly disclosed the destruction of five disks.

5 And I would like to read into the record the disclosure, if  
6 that's okay, Your Honor.

7 **THE COURT:** Sure.

8 **MR. VERHOEVEN:** Quote (As read) :

9 "On or about March 11, 2016, Mr. Levandowski reported  
10 to Mr. Kalanick, Nita Key (Phonetic) and Cameron  
11 Poetzsher at Uber, as well as Lior Ron, that he had  
12 identified five disks in his possession containing  
13 Google information. Mr. Kalanick conveyed to  
14 Mr. Levandowski in response that Mr. Levandowski  
15 should not bring any Google information into Uber,  
16 and that Uber did not want any Google information.

17 Shortly thereafter, Mr. Levandowski communicated to  
18 Uber that he had destroyed the disks. Uber never  
19 used those disks, and does not know whether those  
20 disks contained any of the downloaded material."

21 That is the entirety of their response on that.

22 **THE COURT:** And the date was what, of that answer?

23 **MR. VERHOEVEN:** This is June 8, 2017. This was due  
24 March 31st. We're on an expedited discovery schedule.  
25 This information would have been very, very useful in the

1 preliminary-injunction hearing; it would have been useful for us  
2 in document requests and targeting our discovery. We didn't get  
3 it.

4 **THE COURT:** Which part of that would have been useful to  
5 you?

6 **MR. VERHOEVEN:** Well, to talk to these people about it, to  
7 -- in the preliminary injunction, we could have taken expedited  
8 discovery. Mr. Kalanick, who received this information on  
9 March 11, 2016, was then the CEO of Uber. So -- and  
10 Mr. Poetzsher was senior vice-president.

11 And Ms. Padilla -- I need to tell you that -- well, she  
12 wasn't in this one, she was in the second one. But those two --  
13 you know, Mr. Poetzsher testified at deposition he was very  
14 concerned about this. This was not something that was  
15 inadvertently left out. They claim it was inadvertent.

16 But if you match up the dates, Your Honor, it's a real  
17 interesting coincidence that this information came out after  
18 they fired Mr. Levandowski. After they had cut ties, they  
19 decided to disclose this information which was previously  
20 withheld as privileged, Your Honor.

21 And you said the word this morning, asking about where that  
22 was disclosed in the privilege log.

23 Right?

24 **THE COURT:** Yeah, I want to come back to that.

25 **MR. VERHOEVEN:** Yeah. But they previously said it's

1 privileged. Levandowski gets fired, and all of a sudden they  
2 don't care about him anymore, and they disclosed this  
3 information, and also disclosed another conversation that he had  
4 which I'll get into.

5 **THE COURT:** Wait. Somebody come answer the -- I was trying  
6 to figure this out. And I'd like to see in the privilege log  
7 where it is that you had revealed some item of privilege that  
8 supposedly put anybody on notice of this conversation.

9 **MR. GONZÁLEZ:** So, so, Your Honor, I have the log. There  
10 isn't anything in the log, in fact, about this specific  
11 conversation. There are log entries of communications between  
12 legal counsel.

13 **THE COURT:** But your paperwork -- can I see the order that I  
14 signed?

15 Your paperwork made it sound like you had made some error,  
16 and that it was never privileged to begin with, and you realized  
17 that eventually, but that no harm was done because your  
18 privilege log had basically disclosed, I thought you said,  
19 this -- this conversation.

20 But --

21 **MR. GONZÁLEZ:** No, it doesn't disclose the conversation,  
22 Your Honor. The privilege log doesn't get into the substance of  
23 what the communication is about.

24 I could just --

25 **THE COURT:** Can my law clerk bring up to me -- I think there

1 was something misleading in your response. I'd like to see it  
2 again. Where they say that the privilege log put people on  
3 notice.

4 (Request complied with by the law clerk)

5 **THE COURT:** All right. So what you said in your brief was  
6 that the privilege log -- that Uber logged documents discussing  
7 the five disks, and their destruction.

8 All right, so that's what I want you to show me.

9 **MR. VERHOEVEN:** Correct. So there are documents that  
10 discuss that information on our privilege log. The privilege  
11 log does not contain the substance of the communication, because  
12 that would ultimately be a waiver. Especially the way they're  
13 reading waiver here.

14 What we are saying there to Your Honor is: We're not trying  
15 to hide anything. In fact, there were communications between  
16 counsel, and those are logged. And they are.

17 **THE COURT:** Can I see the document -- my law clerk, bring to  
18 me the document where Mr. González -- it will be Document 806 at  
19 Page 3. I want to see how it came up in the brief.

20 (Request complied with by the law clerk)

21 **THE COURT:** Right. Okay, so here is what you say. This is  
22 Page 7 of 23, but down at the bottom for some reason it says 3.  
23 I don't understand that. But, all right.

24 "Third, Waymo claims Uber willfully failed to  
25 disclose Mr. Levandowski's destruction of five discs

1 of Google material in March, 2016, which Uber  
2 disclosed in its interrogatory response on June 5,  
3 2017. Waymo says that Uber should be held in  
4 contempt for not disclosing this information on  
5 March 31, 2017 in response to this Court's order  
6 dated March 16, 2017. That does not support a  
7 contempt finding in light of Uber's substantial  
8 efforts and good-faith undertaking to comply with  
9 that Order and lack of willfulness in making the late  
10 disclosure of the fact (which is helpful to Uber)."

11 And here is the key sentence:

12 "Uber logged documents discussing the five discs and  
13 their destruction on its privilege log and then  
14 provided information about the five discs after  
15 realizing it could do so in a non-privileged form.  
16 Uber regrets not recognizing that it was possible to  
17 present non-privileged evidence about this  
18 destruction earlier, but that oversight is not a  
19 basis for contempt."

20 Et cetera, et cetera.

21 So what I had thought you were trying to say here is that  
22 somehow you put people on notice there had been a destruction of  
23 the five disks, if somebody had carefully read the privilege  
24 log.

25 **MR. GONZÁLEZ:** No.

1           **THE COURT:** But now what I hear you saying -- so this is a  
2 meaningless point. This is a -- in no way did you put Waymo on  
3 notice about the five disks and their destruction, through  
4 anything having to do with the privilege log.

5           **MR. GONZÁLEZ:** We don't contend that, Your Honor. Our only  
6 point is that we logged information that discussed the items.  
7 And we made that point so that you could see that we're not  
8 trying to hide anything. We had some privileged communications,  
9 and we logged those.

10           And Your Honor, it was --

11           **THE COURT:** Well, why didn't you disclose, as you were  
12 ordered to, that you -- you knew good and well that the five  
13 disks existed, and they had been destroyed, and I had ordered  
14 you to make -- to say so. And, and that's not privileged  
15 information.

16           So what could have possibly possessed a good lawyer like you  
17 to think that you could claim privilege over that information?

18           **MR. GONZÁLEZ:** So, Your Honor, there are a substantial  
19 number of very complicated privilege issues in this case. And  
20 as you know, one of the privilege issues that we have been  
21 discussing with the Magistrate and that she has upheld is the  
22 joint interest -- joint defense privilege regarding  
23 communications involving the due-diligence process.

24           We ultimately determined -- we ultimately determined that  
25 that communication is likely not privileged, and that's why we

1 disclosed it in the interrogatory response.

2 I don't mind telling you, again, it's easy four months later  
3 to say: Why didn't you give them this one little piece of  
4 information? It's important, Your Honor, to keep in mind and  
5 remember what we did do.

6 We interviewed more than 200 people. We went to 280 --  
7 280 -- different computers to try to get information about the  
8 downloaded material. That was always our focus, Your Honor, is  
9 trying to find out: Is this downloaded information over at  
10 Uber? And it isn't.

11 Now, again, these are not easy calls on privilege when  
12 you're talking about a joint interest privilege and discussions  
13 that took place right in the middle of the due -- diligence  
14 period.

15 In fact, if Mr. Levandowski's lawyers were standing here  
16 today, they would probably argue to you that it is privileged,  
17 and that it shouldn't have been disclosed. Which is exactly  
18 what they're arguing now in front of the Magistrate on the other  
19 issue they raised.

20 **THE COURT:** Well, then, why did you disclose it later?

21 **MR. GONZÁLEZ:** Because, Your Honor, we're looking at these  
22 issues, trying to decide in good faith what is privileged, what  
23 isn't.

24 And ultimately, we decided, as you just said, although it's  
25 not quite as easy a call, that, you know what, this conversation

1       between these four individuals that did not involve a lawyer is  
2       probably not privileged, and we should disclose it.

3           And we did, two months ago. And they've now taken the  
4       deposition of every single person in that conversation.

5       **THE COURT:** But how could -- there was no one who was a  
6       lawyer in that -- he reported to your CEO -- Levandowski  
7       reported to your CEO that he had the five disks, and had  
8       destroyed them, and no lawyer was in that communication.

9           Right?

10       **MR. GONZÁLEZ:** That's correct.

11       **THE COURT:** Then how could you have even thought for a  
12       second that that was privileged?

13       **MR. GONZÁLEZ:** Because, Your Honor, under the joint-interest  
14       privilege, it's not necessary that a lawyer be present for every  
15       discussion in order for the joint-interest privilege to apply.  
16       And that's what makes it a challenge in this case.

17           It's not an easy thing to do, Your Honor. It's a minefield.  
18       And we're trying to walk through it in good faith. And when we  
19       find facts that we believe are not privileged, we disclose them.

20       **THE COURT:** But you know this minefield of the joint defense  
21       thing was just a gimmick. This was an ordinary acquisition  
22       transaction.

23       **MR. GONZÁLEZ:** Your Honor, Magistrate --

24       **THE COURT:** Wait a minute. I want to say something here --

25       **MR. GONZÁLEZ:** Yeah.

1           **THE COURT:** -- that I think I've said before, but it's been  
2 on my mind.

3           I have never seen a corporate acquisition, Company A  
4 acquires Company B, and the lawyers get involved and say: Well,  
5 we don't want the world to know what's really going on here, so  
6 let's claim that this is some kind of a joint defense against  
7 Waymo. So we will claim...

8           So that's -- you -- this was a mess of your own making. I'm  
9 not saying you, personally, but somebody there made a -- created  
10 this minefield. If you hadn't had that joint defense thing, you  
11 would have turned that over without -- and I don't even think --

12           **MR. GONZÁLEZ:** Your Honor --

13           **THE COURT:** Look, what this also leads to is the same thing  
14 that Judge Corley got onto your case about -- Ms. Dunn about.

15           This selective decision-making, you're now going back  
16 through the records and saying: Oh, we need that, we need that  
17 conversation. Oh, that's not privileged anymore, let's not  
18 claim privilege, that's not privileged.

19           And yet, you've claimed privilege on 35,000 documents -- or  
20 3,500 documents. And now you're going back through trying to  
21 figure out: Oh, my God, we made a mistake; we've got to have  
22 that for trial.

23           And, and you decided on balance it helps you, not hurts you.

24           I see right through it. You're not fooling me for a second.  
25 I know what's going on. So this falls in that category. This

1 falls in that category. Somebody decided after the fact: Oh,  
2 we need that conversation. Oh, we're going to disclose it now.

3 That's the way it looks. That's how slick it looks.

4 **MR. GONZÁLEZ:** Your Honor --

5 **THE COURT:** You should add this into your proposed jury  
6 instruction, on this order to disclose, they didn't disclose.  
7 Put that in there, that it came out after the fact. And whether  
8 we're going use it or not, I don't know. But I -- it concerns  
9 me that we have this going on here.

10 All right, I need to move on. We've spent an hour on this.  
11 We've got to go on to other -- we have many motions today.

12 So, next motion deals with damages. Who is going to argue  
13 this?

14 **MS. DUNN:** I am, Your Honor.

15 (Reporter interruption)

16 **MS. DUNN:** Dunn, D-U-N-N.

17 **THE COURT:** Oh, wait a minute. Wait.

18 **MS. DUNN:** Oh.

19 **THE COURT:** Mr. Chatterjee rose, and I want to just say  
20 something, Mr. Chatterjee.

21 You -- you, under the order, were supposed to go to  
22 everybody in your company, and make a complete log of every  
23 communication with Mr. Levandowski on the subject of LiDAR.

24 Did you do that?

25 **MR. CHATTERJEE:** We went to everyone, and asked them. The

1 one person that did not give us a response was Anthony  
2 Levandowski, and he asserted his Fifth-Amendment rights.

3 But there are four members of the LLC. They're not  
4 employees, but they are members. We went to all four. We  
5 interviewed them. We submitted the disclosure. And  
6 Mr. Levandowski asserted his Fifth-Amendment rights, and didn't  
7 provide an answer.

8 **THE COURT:** But as to the other three, they were supposed to  
9 tell you about their conversations with Levandowski, emails,  
10 verbal, and everything. And you're telling me you did do that.

11 **MR. CHATTERJEE:** We did do that, Your Honor.

12 **THE COURT:** The other side said you did not do that.

13 **MR. CHATTERJEE:** We did; we submitted the disclosure,  
14 Your Honor, to the Court. And it was fairly cursory, because  
15 none of them had talked to him about LiDAR issues.

16 **THE COURT:** What? None of them had talked to Levandowski  
17 about LiDAR?

18 **MR. CHATTERJEE:** They had not. And I can give you the  
19 reasons why, Your Honor.

20 **THE COURT:** Yeah, I would like to know that. That is hard  
21 to believe, too.

22 Go ahead.

23 **MR. CHATTERJEE:** One of them is Adam Bentley, who is the  
24 legal counsel. And he was the person that was facilitating the  
25 transaction.

1           The second person was Lior Ron, who primarily had a business  
2 role.

3           The last one is Rhian Morgan, who was really in charge of  
4 hiring people and helping -- and they're actually Uber  
5 employees.

6           **THE COURT:** Did Mr. Verhoeven get that disclosure list?

7           **MR. CHATTERJEE:** Yes, Your Honor. We submitted it to them;  
8 we submitted it to the court.

9           **THE COURT:** Okay. Mr. Verhoeven, I had understood your  
10 paperwork to say that they had done zero. But now my -- do I  
11 stand corrected that he did do it, and it's just a short  
12 document?

13           **MR. VERHOEVEN:** Your Honor, my colleague, Mr. Judah, has  
14 been allocated the OT issues, so I'll allow him to answer your  
15 question if that's okay.

16           **THE COURT:** Fine. I just really need a yes or no. Did you  
17 get that document, or not?

18           **MR. JUDAH:** Well, we got a five-line response with respect  
19 to the LiDAR log that said there's no evidence in the record  
20 that they ever interviewed Mr. Ron about any of the LiDAR  
21 communications.

22           **THE COURT:** He just told me that he did.

23           **MR. JUDAH:** There's a five-line --

24           **THE COURT:** Can I see the five-line thing? It will be  
25 easier if you let me look at it.

1           **MR. JUDAH:** Yes, Your Honor. One moment; let me just find  
2 it.

3           (A pause in the proceedings)

4           **MR. CHATTERJEE:** Your Honor, the disclosure is Docket Entry  
5 714. I am happy to read it.

6           **THE COURT:** Read it to me verbatim.

7           **MR. CHATTERJEE:** Okay, this is on Docket Entry 714. This is  
8 romanette (III), under "DEFENDANTS' DETAILED ACCOUNTING":

9           "Mr. Ron, Ms. Morgan, and Mr. Bentley are employees  
10 of Uber Technologies, and as such all three of them  
11 have been interviewed for Defendants' detailed  
12 accounting."

13 So we are incorporating that --

14           **THE COURT:** That's no good. Come on, don't do that to me.  
15 They wear two hats. I want them interviewed on both hats.

16           **MR. CHATTERJEE:** Right. So let me read you what was said in  
17 addition:

18           "Consequently, their information is included in the  
19 accounting filed by Uber."

20 And then we also added:

21           "Ms. Morgan has not seen or heard of the contents of  
22 the downloaded materials. Mr. Ron also has not seen  
23 or heard any part of the downloaded materials."

24           **THE COURT:** That wasn't what I asked you to do. You were  
25 supposed to go to your people, and interview them, and make a

1 log of every single conversation or communication they had had  
2 with Levandowski on the subject of LiDAR. You didn't do that.

3 **MR. CHATTERJEE:** Let me read romanette (iv) for you,  
4 Your Honor. This is the detailed log of Mr. Levandowski's  
5 communications regarding LiDAR:

6 "Ms. Morgan has never discussed LiDAR with

7 Mr. Levandowski. Mr. Ron is not involved in the  
8 development...."

9 **THE COURT:** "Discussed" is not good enough. Did she get an  
10 email?

11 **MR. CHATTERJEE:** She has not. If you want us to amend this  
12 and add that, we can do that.

13 **THE COURT:** You know, I have learned -- so, this is so full  
14 of weasel words. "Discussed" is not good enough. It's got to  
15 cover everything that I had said in the order. Somebody may  
16 have had the emails, but they didn't discuss.

17 You know, some people on TV said "We had no meetings. Well,  
18 okay. Maybe they didn't have meetings, but maybe they had  
19 communications. I am -- you can't slide these weasel words by  
20 me.

21 I'm going to give you until Friday at noon to file something  
22 that is in full conformance with the Court's order. And that  
23 means you have got to go to those people, and interview them,  
24 and look at their emails, look at their text messages, look at  
25 their voicemails, look at their -- interview them again, see if

1       they have got anything in writing, any notes, whether they  
2       remember any conversations.

3           And if it had anything to do with LiDAR, wearing their hat  
4       as an OT person, then they have to -- it's got to go on that  
5       log.

6           Now, I'm assuming that, wearing that Uber hat, that it was  
7       done right.

8       **MR. CHATTERJEE:** Your Honor, we did not mean to be putting  
9       weasel words in. When we were saying "has never discussed," we  
10       did mean in writing or otherwise. But if you want us to flesh  
11       that out, we'll do that.

12       **THE COURT:** I want you to do that. I don't want it left to  
13       some verbal transcript. It should have been done right the  
14       first time. So you go back and do it by Friday.

15       And, and listen: It better be right, because if it turns  
16       out there was some conversation -- I know how it'll come out.  
17       The way it's going to come out is at trial, you're going to be  
18       desperate to use some conversation that's not on your log.

19       **MR. CHATTERJEE:** We will not, Your Honor.

20       **THE COURT:** Oh, yes, you will. That's just what happened to  
21       Mr. González. He's desperate to use conversations that he  
22       claimed privilege on. You're going to be in the same boat. And  
23       then you'll have this disclosure where you say nothing like that  
24       ever occurred.

25       **MR. CHATTERJEE:** Your Honor, Otto Trucking does not develop

1 LiDAR technologies. Never has.

2       **THE COURT:** Doesn't matter. If they had conversations -- I  
3 promise you, they had conversations about it. There's too much  
4 money involved.

5       By Friday at noon, you've got to update it, and make sure  
6 it's right.

7       **MR. CHATTERJEE:** We'll do that. Yes, thank you.

8       **MR. JUDAH:** Your Honor, can I briefly respond?

9       **THE COURT:** No. What do you need? I've ordered him to do  
10 something.

11       **MR. JUDAH:** I was going to point out that the representation  
12 that Ms. Morgan has never discussed LiDAR or received an email  
13 from Anthony Levandowski about LiDAR is patently false.

14       **THE COURT:** Give me an example.

15       **MR. JUDAH:** Well, Uber prepared over 1,000 entries of  
16 Mr. Levandowski's discussions about LiDAR (Indicating).  
17 Ms. Rhian Morgan, for example, received an email -- this is  
18 entry No. 95 on Uber's log. On March 6, 2016, author Anthony  
19 Levandowski, recipient Rhian Morgan --

20       **THE COURT:** Well, if it's already on that log, I'm not  
21 demanding that it be done again. I'm worried that that log is  
22 the Uber log. And I'm -- but that they have somehow hidden in  
23 the weeds on the OT log. I want there to be both hats covered.  
24 The OT hat and the Uber hat.

25       **MR. JUDAH:** I understand that, Your Honor. I'm just saying

1 this accounting says Ms. Morgan has never discussed LiDAR with  
2 Mr. Levandowski. That's not true.

3 **THE COURT:** Well, all right. What do you say to that?

4 **MR. CHATTERJEE:** Your Honor, as I understood what we are  
5 doing here, we incorporated by reference the log. And what we  
6 were talking about is in her capacity as an OT member.

7 **THE COURT:** Well, all right. But next time, wouldn't it be  
8 better to say -- to incorporate the Uber log? Except as  
9 provided in the Uber log, she's never had any conversations? If  
10 that's true -- I'm not saying that's true. In fact, I suspect  
11 that's not true. But I think you ought to verify that. And  
12 I'll give you until Friday at noon to do it right.

13 **MR. CHATTERJEE:** We will do that, Your Honor.

14 **THE COURT:** Thank you very much.

15 All right, Ms. Dunn, let's go back to you. We'll get  
16 started on the motion on damages.

17 **MS. DUNN:** Thank you, Your Honor.

18 **THE COURT:** Stay at a high level first, and tell me at a  
19 high level what the problem is, and then we'll get into the  
20 details.

21 **MS. DUNN:** At a very high level, Your Honor, the problem is  
22 that Rule 26 requires that a party provide computation of each  
23 category of damages claimed, first, and then second, to make  
24 available for inspection and copying the documents or other  
25 evidentiary material on which each computation is based.

1       The Court's June 7th case management order specifically  
2 cited this damages section of Rule 26, in ordering that the  
3 plaintiffs provide both that computation for each category, and  
4 to make available for inspection and copying the documents on  
5 which they rely.

6       Your Honor has written an opinion called *Brandywine*. And  
7 *Brandywine* takes this rule incredibly seriously. So *Brandywine*,  
8 as Your Honor undoubtedly knows, does not require the plaintiffs  
9 to disclose things that they don't know. But it certainly  
10 requires initial computation and disclosure of the evidence that  
11 will be relied upon to the full extent that the plaintiff should  
12 know it. And if the plaintiff doesn't have that information,  
13 they're supposed to be specific about that.

14       *Brandywine* says essentially: Plaintiff, do the best you  
15 have, and disclose something.

16       In this case, the plaintiffs have disclosed absolutely  
17 nothing. Their disclosure has no computation of each category  
18 of damages claimed. Not a single document is identified, much  
19 less made available to us.

20       And there is no identification, specific or otherwise, of  
21 what they could not get. There are two brief paragraphs which,  
22 like a law school textbook, just say catchphrases like "unjust  
23 enrichment" and "lost profits" and "reasonable royalty."

24       That's four months after they filed the suit at a time when,  
25 under Rule 11, they have to have a good-faith basis for even

1 claiming damages in this case.

2 And then, to make matters worse, they had several times to  
3 amend. The date was extended from the original date. This was  
4 one of the first times that you and I had a conversation, where  
5 I asked you if you would extend the date for initial disclosures  
6 to June 21st. And you granted that. And you said: But if  
7 you're going to supplement, you're going to have throw yourself  
8 on the mercy of this Court.

9 The only amended disclosures to date that have been filed by  
10 Waymo were filed the day after June 21st, on June 22nd. And  
11 that was to disclose 14 late-disclosed witnesses. Not to fix  
12 the damages problem in their original disclosures.

13 We are 55 days to trial, which is heart-stopping to probably  
14 everyone in this courtroom. Uber does not have second amended  
15 complaint calculations, the basis for them, the theories, the  
16 methodology, or any documents identified that they're  
17 specifically going to rely on. And this includes things that  
18 are in their own control. They have preserved every angle of  
19 their own flexibility.

20 And so the question at this point is what to do about it.  
21 And Your Honor has already said what the remedy would be. So  
22 does Rule 37. It says that they must be precluded from  
23 presenting their damages case.

24 And here, they haven't just violated Rule 26; they've  
25 violated the Court's own order and the Court's own previous

1 decision in this court.

2 So, fact discovery is nearly over. We have been unable to  
3 ask financial witnesses from Waymo, including their -- the CEO,  
4 the head of marketing, the head of business ops, any questions  
5 that would have come from knowing what their documents are or  
6 what their theories are.

7 Expert discovery is two weeks long. So, they had seven  
8 months to do this. Seven months to develop their damages case.  
9 And we are going to have two weeks, with no initial disclosures  
10 from them.

11 And so they're going to come up here, I anticipate, and  
12 they're going to blame us for this. And they are going to say:  
13 Well, we didn't have things from Uber.

14 But what's required under Rule 26, under the Court's order  
15 and under *Brandywine* is you disclose in your initial disclosures  
16 what you do know. And Your Honor has said: You can't -- can't  
17 just disclose things later in interrogatories, and dump  
18 documents on the party.

19 This is a disclosure issue, not a discovery issue. So in  
20 case they come up here and say: Well, we disclosed a bunch of  
21 stuff in the interrogatories, that is not sufficient to cure the  
22 problem.

23 And also, by the way, even despite trickling out vague  
24 information and theories in their interrogatories, we still, to  
25 this day, don't have the two things mandated under Rule, 26 and

1 under *Brandywine*, and under this Court's order.

2 So I know a lot of times lawyers come up here and we say:  
3 We're prejudiced, we're prejudiced. We are prejudiced. I mean,  
4 this is severe prejudice on something that they could be  
5 claiming billions of dollars on. We don't even know this.

6 So, you know, Waymo has intimated itself in its briefing.  
7 This is not a money case for Google, for Waymo. This is -- they  
8 want an injunction. And it may be time to just face up to the  
9 fact that they want an injunction. Because either they are  
10 purposely withholding from us what we need to prepare, what we  
11 need to depose their witnesses, what we need to respond to  
12 expert reports, or they don't have a damages case at all.  
13 Because it's an entirely non-commercialized market. And Judge  
14 Corley has recognized it's very speculative.

15 So, they've put forward basically nothing for us to work  
16 with. It's already a speculative question, what damages could  
17 even be. And now we're speculating on top of speculation, and  
18 headed into expert discovery, which is just going to be  
19 completely, completely prejudicial to Uber.

20 So I know we're the defendant. I know we're the defendant.  
21 And so, there's -- you know, and we have a lot of --

22 **THE COURT:** What is wrong with that? What do you mean?

23 **MS. DUNN:** Nothing. We love being the defendant.

24 **THE COURT:** But you say: We know we're a defendant.

25 **MS. DUNN:** The plaintiffs have the information here. The

1 plaintiffs have the information here. And they, they push for  
2 this expedited schedule. This is what they wanted. They got  
3 it. And they are taking --

4 **THE COURT:** You agreed to it.

5 **MS. DUNN:** -- advantage. They are taking --

6 **THE COURT:** You agreed to it. Both of you agreed to the  
7 same trial date. Right?

8 **MS. DUNN:** Your Honor, we also agreed to abide by Rule 26.

9 **THE COURT:** Yeah.

10 **MS. DUNN:** And they have seven months, and we have two  
11 weeks. In an incredibly, as they say, incredibly -- they  
12 present -- they said -- their excuse for not putting this in the  
13 disclosures originally was: It's complicated.

14 Well, first of all, damages in an ordinary case are  
15 complicated. And damages in this case, when you're concocting  
16 some theory no one's even heard of for a non-commercialized  
17 market, are going to be incredibly complicated. We have two  
18 weeks to deal with that.

19 But the point is, Your Honor, the rules have already laid  
20 out what is supposed to happen here. And so we're not asking  
21 for anything extraordinary. We're just saying: Enforce the  
22 order.

23 **THE COURT:** All right. I've got to give my court reporter a  
24 chance to rest her fingers. So we will take a 15-minute break,  
25 and we will resume right there. And we will hear from the other

1 side when we come back.

2 (Recess taken from 9:18 a.m. to 9:41 p.m.)

3 **THE CLERK:** Please come to order. Court's now in session,  
4 Honorable William Alsup presiding.

5 **THE COURT:** Welcome, again. Please be seated. Let's go  
6 back to work, and hear from Ms. Baily.

7 **MS. BAILY:** Thank Your Honor.

8 So before the break, we heard defendants say that they  
9 essentially have no information about our damages allegations.  
10 And they haven't had an opportunity to ask our witnesses about  
11 damages-related information. That is not true.

12 Before defendants took a single deposition of a Waymo  
13 businessperson, they had a 24-page narrative related to damages  
14 theories, unjust enrichment and reasonable royalty -- two  
15 damages theories. Reasonable royalty, unjust enrichment.

16 They had most, if not all, of the documents that Waymo has  
17 that are relevant to those theories. They had historical cost  
18 information. They had forward-looking P&Ls. They had strategy  
19 documents that were shared with Alphabet executives. They had  
20 the business plan of record. They had all of this before they  
21 took a single deposition of a Waymo businessperson. They have  
22 had this information for more than a month, so it was a little  
23 bit of a misleading picture that was painted here.

24 **THE COURT:** Have I seen that document? What is that  
25 document, that 24-page narrative?

1       **MS. BAILY:** That I can give you --

2       **MR. VERHOEVEN:** If you are talking about your Rule 26  
3 disclosure, I do have that.

4       **MS. BAILY:** This was an interrogatory response on damages.  
5 That was provided more than a month ago.

6       **THE COURT:** Let me ask my law clerk, do we have that?

7       **THE LAW CLERK:** (Inaudible)

8       **THE COURT:** She says no. So somebody ought to hand that up  
9 to me.

10      **MS. BAILY:** Sure. I can give you the document number as  
11 well. It is Docket No. 933-3, it's Exhibit 6.

12      Would you like me to hand up the copy that I have?

13      **THE COURT:** Yeah, that would be good.

14      **MS. BAILY:** It might have some of my notes on it, so -- just  
15 don't --

16      **THE COURT:** Does it say something like: This theory is no  
17 good?

18      **MS. BAILY:** It says: This theory is awesome.

19      (Document handed up to the Court)

20      **THE COURT:** Just because there are a lot of young people out  
21 there, you know, let me just say, you start off by saying  
22 "Plaintiff's objections and responses." You know, your  
23 inclination is go with objections first.

24      It really should be the other way. You should be giving the  
25 image that you're responding. Ought to say "Plaintiff's

1 responses and objections." Put it in reverse order, so it makes  
2 it looks like you're doing something other than just objecting.

3 **MS. BAILY:** That's a good point.

4 **THE COURT:** All right. What do I want to look at?

5 **MS. BAILY:** Well, sorry, I don't have it in front of me, but  
6 I believe most of that is actually our response to a contention  
7 'rog on damages. And it does set forth the two theories that  
8 we're planning to put forward. The unjust-enrichment theory and  
9 the reasonable royalty theory. It does cite documents.

10 It does provide some amount of detail, based on the  
11 information that Waymo has that are inputs to those types of  
12 damages theories.

13 **THE COURT:** Give me those again. Unjust enrichment and  
14 what?

15 **MS. BAILY:** And reasonable royalty.

16 **THE COURT:** Where can I find the reasonable royalty part?

17 **MS. BAILY:** So there should be two bolded headings in the  
18 response. Of course, the objections come first. Maybe they  
19 should come after the response.

20 But the response has -- should have a bolded heading, if I  
21 recall correctly. The first one is "Unjust Enrichment" and  
22 that's several pages. And then we move on to reasonable  
23 royalty.

24 **THE COURT:** Having not seen this before, I can't find where  
25 the reasonable -- what page numbers do I look for?

1       **MS. BAILY:** I apologize, I handed up my copy. I'm sorry,  
2 Your Honor.

3       **THE COURT:** Do you know, Ms. Dunn?

4       **MS. BAILY:** If you don't have notes on yours and you want me  
5 to look, I can.

6       **MS. DUNN:** I have some notes.

7       **MS. BAILY:** If you want me to take a quick look at your  
8 copy, Your Honor, I might be able to just give you the page  
9 number.

10       **THE COURT:** I do see where it says: Damages for  
11 infringement of Patent 936. Is that what you're talking about?

12       **MS. DUNN:** Your Honor, on Page 14.

13       **MS. BAILY:** There should be multiple sections. We deal with  
14 the trade secrets first. And we put forward an unjust  
15 enrichment and reasonable royalty theory for the trade secrets.  
16 And then we moved --

17       **THE COURT:** I see, all right, "Reasonable Royalty."

18       **MS. BAILY:** And then we move on to the patent at the back.  
19       So we have our unjust-enrichment theory, and then we have a  
20 reasonable royalty theory. The trade secret statutes provide  
21 for both an unjust-enrichment theory and a reasonable royalty  
22 theory. They also provide for lost profits. But we're not  
23 asserting lost profits as a stand-alone theory in the case.

24       And I do think, because of the nature of the theories we do  
25 incorporate our analysis under unjust enrichment, some of those

1 factors would also come into play with a reasonable royalty. We  
2 do not repeat those.

3 **THE COURT:** I'm going to need to see this document, but how  
4 do I get my hands on a copy of this? Is this in the court file  
5 somewhere?

6 **MS. BAILY:** It is in the record. I'll tell you, the  
7 document number is 933-3.

8 **THE COURT:** All right. I'm going to hand your copy back.

9 (Document handed down)

10 **THE COURT:** At least I know what you're talking about.

11 **MS. BAILY:** So I do want to make the point that -- that this  
12 was served again before any depositions of our business people.  
13 And so defendants had it. And they've asked questions about the  
14 subject matter that was disclosed in interrogatory response.

15 And again, they also had -- you know, documents are cited in  
16 this interrogatory response. Again, before they took a single  
17 deposition of a Waymo businessperson, they had the documents  
18 that Waymo has that are important to these kinds of analyses.  
19 The P&L going forward, historical costs broken down, to the  
20 extent that we have historical costs that are broken down in as  
21 much detail as we can provide, going backwards. Our future  
22 estimates of revenues, profits, cash flows; our business plan of  
23 record; our strategy documents; this was all produced and  
24 provided. And a lot of it was referenced in our response before  
25 depositions went forward of Waymo's business people.

1       The problem is that Waymo's information, alone, is obviously  
2 not sufficient for us to develop the full-fledged damages  
3 models. This is somewhat of an unusual case. It does relate to  
4 a nascent market. We need to understand Uber's side of the  
5 ledger -- what information do they have, how robust is it, what  
6 was their business record, and business plan before and after  
7 the Otto acquisition, et cetera.

8       And when did we get that information from Uber? We got it  
9 yesterday. We had to go to the special master seven times to  
10 get any information produced to us related to these damages  
11 theories. We got it yesterday. We have nine days now with it.

12       So, we have already been through all of these depositions.  
13 We have another week and a half only remaining in fact  
14 discovery. We have expert reports due on the 24th, and we got  
15 Uber's side of the ledger yesterday. So we have nine days to  
16 take that into account, and to use it as we need to do, as  
17 inputs to these models.

18       We can't do a complete computation and a complete analysis  
19 without that information. We got it yesterday. They've had our  
20 information for more than a month. We got theirs yesterday. We  
21 have nine days with it now before our expert reports are due.

22       So when you look at the situation globally, the prejudice is  
23 actually lying here with us. Not with defendants.

24       So, again, we provided our information early in the case,  
25 before the relevant depositions. They have had every

1 opportunity. We have not. Defendants fought us every step of  
2 the way.

3 It was previewed, right? They knew I would get up here and  
4 say that, because it's true. They say: You have to wait to  
5 serve your damages discovery. Then they said: Actually, no,  
6 you shouldn't be able to serve any damages discovery.

7 We had to go to Special Cooper on that.

8 Then we finally are able to serve our damages discovery.  
9 The deadline comes for their responses. We get nothing. We  
10 don't get a document. We have to go back to the special master.  
11 So this has been going on and on and on. And we finally got the  
12 materials yesterday.

13 So, we're going to look at those materials now. We're going  
14 to finish our depositions. And we are going to, you know,  
15 supplement our interrogatory response, as we can, with that  
16 information.

17 **THE COURT:** When you say about reasonable royalty that you  
18 would know what your own trade secrets are, you ought to have  
19 some idea, dollar amount as to what the royalty would be for a  
20 willing buyer, a willing seller, and for that particular trade  
21 secret.

22 For example, if you had ever licensed any of that technology  
23 to some other company, you could refer to that document and make  
24 that available, and refer to that percentage rate or dollar  
25 amount. But none of that ever happened.

1           So what do you say to that argument?

2           **MS. BAILY:** Well, what I would say is that this is not that  
3 case where we have comparable licenses. We don't. We don't  
4 license little bits, you know, of our LiDAR technology. We made  
5 that clear. And they have known that from the beginning.

6           What we were interested in knowing, you know, as part of our  
7 analysis is, you know, what -- does Uber have any licenses? We  
8 found -- you know, we find wouldn't that out until yesterday.

9           So this is something --

10           **THE COURT:** Well, what is the answer? Do they have any?

11           **MS. BAILY:** You know, I haven't had a chance since yesterday  
12 at noon, when they made this dump, to go through all of that  
13 information before the hearing today.

14           This is really a case where, you know, we have an  
15 unjust-enrichment theory, we have a reasonable-royalty theory.  
16 We did provide them our response. And we would have handed them  
17 over when we handed over the other information that is relevant  
18 to these theories that we do have, which is our P&Ls going  
19 forward, our revenues, profits and cash flow projections, our  
20 historical cost information, and all of our business-related  
21 documents, which they've had for more than a month. And now we  
22 get theirs for nine days.

23           So we -- you just -- we can't put together, especially in  
24 this case, any robust damages model with only our pieces of the  
25 puzzle. And with respect to our pieces of the puzzle, we

1 provided it, in a long narrative and in documents. And they've  
2 been asking questions about it.

3 So this notion, you know, that they've been prejudiced in  
4 some way, it's just not true. Waymo actually is the one that's  
5 been prejudiced. And they've done it all along, in refusing to  
6 provide the relevant information to us so that we could finish  
7 determining the best way to quantify the damages that we can  
8 quantify.

9 **THE COURT:** Okay.

10 Ms. Dunn, what do you say to that?

11 **MS. DUNN:** Well, first of all, none of this discussion about  
12 what happened in discovery is relevant to the question of  
13 disclosure. So the rules, the Court's order, and the law all  
14 say that what plaintiff knew at the time of the initial  
15 disclosures has to be told to the defendant. Otherwise, the  
16 remedy is preclusion.

17 **THE COURT:** Well, it may be preclusion. There are other  
18 possible remedies. But flesh that out. Just take reasonable  
19 royalties. What more -- you heard what the answer was, asked.  
20 What more could Ms. Baily have said to you, since they don't  
21 have any comparable licenses?

22 **MS. DUNN:** Your Honor --

23 **THE COURT:** What more can they say?

24 **MS. DUNN:** So we don't have any knowledge about a royalty  
25 base. We don't have a royalty rate. We don't have a term of

1 infringement. I made myself a chart of all the things we don't  
2 know, because there are a lot.

3 We don't know if there is a lump sum versus a running  
4 royalty, if that's what they are going to pursue. We don't even  
5 know if they're claiming for each trade secret. These are  
6 things all within their knowledge.

7 And the reason these rules exist this way is because the  
8 plaintiff is supposed to disclose. And dumping a lot of  
9 information on defendants without saying what your methodology,  
10 what your rate, what your -- specifically how you're going to  
11 use the documents without offering a number, we don't even have  
12 a number at this point. That is the purpose of these disclosure  
13 rules. And that is precisely what's not allowed.

14 For unjust enrichment, they put forth four possible  
15 theories. And their filing that they pointed you to starts out  
16 by saying several measures that can be used. Are they using all  
17 these measures? I don't think these measures are potentially  
18 co-existent.

19 So they say this, but we don't have their own calculations  
20 about their cost savings, about developing their own trade  
21 secrets. This should be knowable. They have not given us any  
22 clear figures. We don't know if the trade secret numbers  
23 overlap. It is not an answer to say: We handed over a bunch of  
24 documents.

25 And I'm glad that counsel raised the issue of the P&Ls. So

1 yes, we received some P&Ls. And the P&L are similar in  
2 structure, but they use different numbers. So we don't even  
3 know which is the operative P&L. We don't know what the expert  
4 is going to rely on, which is what Rule 26 itself says we're  
5 supposed to have.

6 And then, when we're trying to figure something out from the  
7 witnesses, they can't even tell which is the operative P&L.  
8 They say it's impossible to tell when these things are created.

9 **THE COURT:** Whose P&L, and why does it matter?

10 **MS. DUNN:** It's their P&L. And the reason you want to know  
11 the P&L is because you're trying to figure out how much -- what  
12 the costs were. Because they're going to say that this is  
13 relevant to the cost savings that Uber had. So, what Waymo  
14 spent to develop the trade secrets is going to be relevant.

15 **THE COURT:** Okay, let's just stop for a second. This is  
16 helpful, but I want to pursue this point.

17 So let's take -- I have to do this in vague terms because I  
18 guess this is a trade secret, but the trade secret that involves  
19 overhang or underhang, or right, no hang -- okay, that's not a  
20 trade secret, what I'm saying. All right.

21 So are you going to have a theory that that could have been  
22 licensed to Uber because they allegedly violated it, and here's  
23 -- what is your theory, just on that?

24 **MS. BAILY:** It will be first an unjust-enrichment theory.  
25 And then potentially a reasonable-royalty theory as well.

1           **THE COURT:** All right. So the unjust-enrichment theory will  
2 be something like this, I guess: Imagine your ordinary -- no,  
3 no. Figure out how much money Uber saved by avoiding the  
4 experimentation to come to that conclusion.

5           Is that right?

6           **MS. BAILY:** I think it's a little bit more complicated, but  
7 you're right to point out the fact that it actually depends a  
8 lot on Uber's side of the ledger. Because it can't just be  
9 that, you know, Waymo spent all of this money developing these  
10 trade secrets. There are a lot of predicates to -- you know, I  
11 don't want to step into confidential information.

12           But you can't just look and defendants would cry foul if we  
13 just looked at how much it cost for us to develop these trade  
14 secrets.

15           Where was Uber in the process? What resources do they have?  
16           What investment did they make?

17           **THE COURT:** So let's say that it would have taken somebody a  
18 week -- an engineer one week to figure that one out.

19           **MS. BAILY:** So it's more complicated than that, Your Honor.

20           **THE COURT:** Maybe not. Maybe it would be less complicated  
21 than that.

22           All right, let's say two weeks. How much money can that  
23 possibly be? That's not very much money. That's \$30,000.

24           **MS. BAILY:** I'll say that these -- the trade secrets that  
25 were elected for trial now, many of them are not susceptible to

1 that kind of analysis.

2       **THE COURT:** Well, what -- tell me how -- give me an example  
3 of one where this is going to get you into the stratosphere.

4       **MS. BAILY:** Sure. There is one trade secret that has a  
5 variety of specification that could only be and were only  
6 arrived at because of the number of miles that Waymo has driven  
7 on real roads, and in simulated driving, over many years, based  
8 on iterations of hardware.

9           And there is no way that these specifications could have  
10 been -- and these specific cases that are involved in these  
11 specifications could have been determined in the robust way that  
12 is now allowing Waymo to commercialize, based on them, in a safe  
13 way, without doing --

14       **THE COURT:** Is this a scenario --

15       **MS. BAILY:** -- all of that work.

16       **THE COURT:** Is this a scenario trade secret with the ways to  
17 guard against that scenario? Is that the one?

18       **MS. BAILY:** It sounds like it, Your Honor. I could get you  
19 the number of the trade secret.

20       **THE COURT:** And are you going to be able to prove that they  
21 used the exact same set of precautions and LiDAR -- LiDAR  
22 signals to -- seems unlikely that you are, but maybe, maybe they  
23 copied that exactly. Did they?

24       **MS. BAILY:** We have evidence of use, Your Honor.

25       **MR. CHATTERJEE:** (Nods head)

1           **THE COURT:** Of use? So, are you going to be able to show  
2 that there was some point in time where that exact set of LiDAR  
3 signals was used to sort of jump-start their program? Even if  
4 they're not using it now, they used it at one point in their  
5 development?

6           **MS. BAILY:** Well, I would say, Your Honor, having that  
7 information that resulted from seven years of iterations and  
8 driving miles, it's in some ways the crown jewels of the kind of  
9 technology that we are talking about.

10           So I would say that having access to that and having -- and  
11 evidence of use with respect to that, that's a big damages  
12 number.

13           **THE COURT:** All right. So, but I -- maybe we'll hear more  
14 about this, in this closed session. But I think I know the  
15 trade secret you are talking about.

16           And are you going to be able to show that that document is  
17 in the files of Uber? I don't think so.

18           **MS. BAILY:** We have evidence of the use of the information.

19           **THE COURT:** I'm going to just leave it there.

20           Do you know which one she's talking about?

21           **MS. DUNN:** I do know. I --

22           **THE COURT:** Well, all right. Well, that one, if it was in  
23 fact used and consulted, that would be some valuable  
24 information. I think that's correct. I don't know what the  
25 dollar amounts would come to.

1       But on the other hand, I am surprised to hear you think that  
2 you're going to be able to prove they used it. But I -- I'm  
3 learning as I go. I didn't know about the interrogatory answer  
4 either, so maybe you do have that proof.

5       **MS. BAILY:** Your Honor, I would say two additional things,  
6 if -- if allowed.

7       **THE COURT:** All right.

8       **MS. BAILY:** Obviously, I mean, this is an attempt to take  
9 damages out of the case. Both our damages and punitive damages.  
10 And the Ninth Circuit has said that before you can do that, you  
11 actually have to show bad faith and willfulness.

12       We have provided, again, information in advance of their  
13 depositions, just so they can do the discovery that they need  
14 and want to do on damages. There is no willfulness or bad faith  
15 in here. We cite to the R&R case in our opposition. And they  
16 haven't even attempted to say that there is.

17       We're providing all of the information that we have. Again,  
18 we're the ones being prejudiced because we don't get the  
19 information that they have until yesterday.

20       And I do just want to remind the Court that setting aside  
21 the OSC issues, even, the defendants have had opportunity after  
22 opportunity after opportunity to fail to provide information, to  
23 amend information, on and on and on. Right?

24       So, even Uber's LiDAR log was ordered to be provided on a  
25 certain day. They provided about half of what the

1 communications were, because they just apparently didn't have  
2 enough time to pull it together. Nothing happens. Right?

3 So we're prejudiced. We get more information, supplement,  
4 supplement, supplement. Depositions are ongoing. There's  
5 prejudice there.

6 Their privilege logs are meaningless. You cannot tell one  
7 entry from another. And this isn't, you know, that they need to  
8 disclose the privileged communication in a log. This is: Every  
9 description is the same. 3,500 times. Right?

10 Judge Corley has found it insufficient. They're ordered to  
11 amend. They amend, they amend, they amend. Right?

12 So the notion that they are seeking to strike our damages  
13 when we provided information in advance of any depositions that  
14 were taken, and they've had the full opportunity of discovery  
15 where we haven't, it's just -- it strikes a level to me of  
16 unfairness.

17 And I raise it, because you mentioned at an earlier hearing  
18 that you would take fairness into account here. And I think  
19 it's important do that.

20 **THE COURT:** Well, that's a good point.

21 Ms. Dunn, I'm going to take judicial notice of how many  
22 times your side has violated scheduling orders, and been late,  
23 and taken it upon yourself to do things after the fact. And  
24 that's true. You have done that, and you have gotten away with  
25 a lot of it.

1       So now you are insisting on a Rule 26 disclosure deadline,  
2 which is a legitimate point. But nevertheless, what do you say  
3 to the unfairness of me holding Waymo to all the deadlines, but  
4 you get to skate by with blowing off the deadlines?

5       **MS. DUNN:** So Your Honor, I think that these things are not  
6 on the order of being remotely the same. There are certain  
7 things that are rolling responsibilities that we have. The  
8 accounting, for example, logs, et cetera.

9       The law could not be more clear here. And Your Honor's own  
10 decision in *Brandywine* says what they have to disclose. And it  
11 accounts for the idea that defendants may have to produce  
12 information as the case goes on, and that not everything will be  
13 known at the time of the disclosures.

14       Their disclosures here could not be more obviously violative  
15 of the rules, and of the order, and of the case law that has  
16 been followed in this district. And we are talking about a  
17 potentially, you know, multi-billion-dollar claim.

18       And even this colloquy that counsel has had with you here,  
19 she says: Well, we might -- we're going to do unjust enrichment  
20 for the trade secret, and we might do reasonable royalty. We  
21 don't know. We still don't know. These are the things that we  
22 are supposed to be told to litigate the entire damages case.

23       This isn't about one fact here or there. This is about the  
24 entire damages case in this -- in this case.

25       And so we're dealing with a situation where there is law

1 here that specifically says what's supposed to happen. So I  
2 want to address just one example, which is, you asked counsel  
3 about TS 7. I know them by number, so I'll just call by the  
4 number. So, and how much does it cost.

5 Well, Waymo has said that for TS 7, 8, 16, 19, 20, and 43,  
6 they're all in the range of -- and I'll just say "big number"  
7 because I don't think I'm supposed to say what the number is.  
8 But all of those trade secrets are in the range of big number,  
9 without taking into account any bonus expense paid at the end of  
10 2015.

11 Then, one of their responses says that just for TS 7, alone,  
12 is that same big number. So, how is that even possible? TS 7  
13 is that number, but all these trade secrets are that number. We  
14 don't know.

15 And the problem is, and the cases are really clear, you  
16 cannot just dump out information, or even in good faith, dribble  
17 out information in discovery, without being clear about what you  
18 are doing, without putting forth the computation, and without  
19 making available to us specifically what you are relying on in  
20 saying you're going to rely on it. And they have not done that.  
21 These interrogatories do not change that, even a little bit.

22 And the -- you know, they say that we haven't produced --  
23 their RFPs were served to us later than ours were served. And  
24 you know, they say they have had motions to compel, we have had  
25 motions to compel, everyone has motions to compel. The point of

1 the rule is that none -- these discovery disputes are not  
2 germane.

3 So I think it's important for you to know, Your Honor, that  
4 as we stand here, we still do not have a supplemental  
5 disclosure. We still do not have the things that we would need  
6 to know to prepare a summons to their potentially  
7 multi-billion-dollar -- we don't know -- damages case. But the  
8 truth is it doesn't matter. That is the point of Rule 26. And  
9 Your Honor put them on notice when you said they need to do it.  
10 And those two paragraphs that say absolutely nothing in their  
11 disclosures shouldn't -- should not just be let go.

12 So I don't want to litigate all the privilege logs and all  
13 the accounting, because that would take a very long time. But I  
14 do not think it's true that we are disregarding the Court's  
15 deadlines.

16 But this is -- you know, this is very serious. I also think  
17 the fact that even at this hearing, no damages theory can really  
18 be articulated, it just suggests that the reason this is so  
19 difficult -- and I appreciate that it's so difficult -- is  
20 because these damages theories are an ill fit. This is a case  
21 about an injunction. It's a case about an injunction.

22 **MS. BAILY:** Your Honor --

23 **THE COURT:** Wait, no. They want an injunction, but they  
24 also want damages.

25 **MS. DUNN:** Well, then, they should have in their disclosures

1 said what they were doing. They, under Rule 11, had to have  
2 known that at the time of this complaint. And they still  
3 haven't said.

4 **THE COURT:** What were you going to say?

5 **MS. BAILY:** Look, Your Honor, first of all, Ms. Dunn does  
6 not dispute that we need information from Uber to come up with a  
7 number. So this notion that she keeps saying that we should  
8 provide an actual computation before we get damages information  
9 from Uber, she's not disputing that that is just not something  
10 that we can do. We need information from Uber.

11 What we've done is exactly what we're required to do, which  
12 is we provided a narrative of our -- regarding our damages  
13 theories, and we've provided the information that Waymo has that  
14 is relevant to it. And we have identified that. And they have  
15 had the opportunity to ask our witnesses about that information.

16 And the notion that your court order providing a June 23rd  
17 deadline for a log of communications permits them to roll out  
18 amendments as they see fit -- most recently, I think, last  
19 week -- is just preposterous to me, that that's a rolling  
20 deadline. That was a deadline in your court order that said  
21 that the accounting had to be provided by June 23rd. They saw  
22 fit to provide what they could at that time, and have continued  
23 to roll out information to us as the discovery period ends.

24 That's a rolling deadline? I did not think that your order  
25 said that there was a rolling deadline with no finality to it.

1 That's surprising to me.

2 So, so, sorry to sound a little bit incensed here, but it is  
3 a little bit of a ridiculous double standard, when we have  
4 actually provided the information that they're claiming that  
5 they haven't -- that we haven't provided.

6 **THE COURT:** All right. Here's the answer. I'm not going to  
7 rule on this today. I think the best thing to do is to see what  
8 your damages theories actually turn out to be. And maybe then,  
9 it will be clearer how fair or unfair the process has been.

10 So, you may wind up still getting dinged on this, Ms. Baily,  
11 but it may be that -- it may be that when I see the actual  
12 damages theories, I will think that prejudice has been slight,  
13 and therefore, overlook this. I don't know. It's hard to know  
14 until I see the damages theory.

15 So, this piece of the controversy will be held in abeyance  
16 for a while. I thank you both.

17 **MS. BAILY:** Thank Your Honor.

18 **MS. DUNN:** Thank you, Your Honor.

19 **THE COURT:** While I have you here, this is a somewhat  
20 related thing. I got a letter about a précis request from MoFo,  
21 I think, that you wanted to file a summary-judgment motion.

22 **MR. GONZÁLEZ:** That's correct, Your Honor.

23 **THE COURT:** And I'm not going to rule on that now, because I  
24 haven't even gotten your response yet to this.

25 Have you seen what I'm talking about?

1       **MS. BAILY:** Yes.

2       **THE COURT:** Ms. Baily.

3       **MS. BAILY:** Well, to be clear, I haven't actually --

4       **THE COURT:** The one thing that confuses me is talking about  
5 a work-around or not -- a redesign, redesign. So what I take  
6 from that -- but it doesn't say it because it's cleverly  
7 worded -- is that Fuji's redesign, you got some redesign, and  
8 you seem to ignore the fact that there must have been a prior  
9 design.

10       So are you -- so you want me to bless on summary judgment  
11 the redesign and say that doesn't infringe, but then where would  
12 that leave us for purposes of trial? Would the re- -- would the  
13 original design still be in play for the jury to assess?

14       What's going on there?

15       **MR. GONZÁLEZ:** So Your Honor, because it is a product that  
16 we've never sold, we don't believe that there are any damages.  
17 And to be clear, the redesign is absolutely not a concession  
18 that there was anything wrong with our design in the first  
19 place.

20       You used an example earlier in court -- that's all I'm going  
21 to refer to -- that we don't think is a trade secret to begin  
22 with. But if they claim that, you know: X is a secret, and we  
23 can very easily change it to Y and render it moot, that is what  
24 the issue is, with respect to that one item.

25       There are others, Your Honor -- and none of this is secret.

1 There are --

2       **THE COURT:** Well, these are concerning patents. So this  
3 can't be a trade secret. This is -- this is about the inductor.  
4 And so this is not the trade secrets at all, is it?

5       **MR. GONZÁLEZ:** Well, it's both, Your Honor. There were  
6 issues on both. So we want to move on the patent claim and on  
7 the trade secret claims.

8       The issue that you just identified is only one of the  
9 issues, but there are other reasons why we believe we are  
10 entitled to summary judgment, including there's a lot of prior  
11 art for some of these alleged trade secrets. They're not secret  
12 at all.

13      **THE COURT:** Why can't you just present that to the jury? We  
14 don't have time for a bunch of summary judgment motions. Why  
15 are you doing this to me?

16      **MR. GONZÁLEZ:** Your Honor, we're just -- you know, they just  
17 identified -- what was it, ten days ago? I've lost track of the  
18 days now, frankly -- their nine secrets.

19       Remember, they stood here the last time we were in court,  
20 and you asked them: Do you have any information that they're  
21 using your secrets? And they rattled off, like, nine things,  
22 confidently? They've dumped eight of them.

23      **THE COURT:** They what?

24      **MR. GONZÁLEZ:** They've dumped eight of them.

25      **THE COURT:** What do you mean, "dumped eight of them"?

1           **MR. GONZÁLEZ:** When they picked the actual nine, only one of  
2 the ones that they uttered to the Court is included. Because  
3 they realized the other ones were no good. And so we're just  
4 now learning, Your Honor, what ones they want to try. So it's  
5 not our fault.

6           They're the ones that said this was an emergency, and we've  
7 got to have this trial. That shouldn't deprive our client --

8           **THE COURT:** You were the one that wanted the early trial  
9 date, too, before you found out what the ruling was on  
10 preliminary injunction. Then you changed your tune.

11           **MR. GONZÁLEZ:** Not really, Your Honor. No, no. To be  
12 clear, to be clear, our client still wants an early trial. We  
13 want to get this thing resolved. If there's a problem with a  
14 widget, we'd like to know about it. We don't think there's a  
15 problem.

16           **THE COURT:** All right. But to come back to my only question  
17 on this, you say "redesign." But if I were to hear this, it  
18 would still be the old design that we would still have to  
19 litigate. Right?

20           **MR. GONZÁLEZ:** Your Honor, we believe that there are legal  
21 reasons why they would not have to litigate the old design.

22           **THE COURT:** Usually you get to the redesign after you get --  
23 you're found to have infringed. And then you come back to me  
24 and say: Judge, will this redesign work? And then I say yes or  
25 no. But the jury gets to decide whether the original design was

1 bad or not.

2 I think you're trying to get me to rule in advance that  
3 there are some kind of -- this redesign, it's going to -- you  
4 don't even have it in a product yet.

5 You're just saying: Judge, will this work?

6 I don't know.

7 **MR. GONZÁLEZ:** It's not asking for an advisory opinion,  
8 Your Honor.

9 **THE COURT:** I think it is.

10 **MR. GONZÁLEZ:** We will establish -- we will establish that  
11 there's been a change in the device, such that the device, as it  
12 exists today, even if they're right that it's a secret or -- or  
13 on the patent issue, it doesn't infringe, either way.

14 **THE COURT:** Okay. Did you want to say something on this?

15 **MR. JAFFE:** I just want to respond briefly to Mr. González's  
16 misstatement about something that I said in court a couple of  
17 weeks ago, which was about the list of trade secrets.

18 **THE COURT:** I do remember you rattling off a list of  
19 numbers.

20 **MR. JAFFE:** Yes. And as I mentioned at the time, it was off  
21 the top of my head.

22 But the point of the colloquy that we were having, as I  
23 understood it, was you were asking what evidence of trade  
24 secrets do we have. And I rattled off a list.

25 **THE COURT:** No, I said trade secrets that were violated.

1           **MR. JAFFE:** That's right. And I guess Mr. González and Uber  
2 has now taken it to this idea that we've identified other ones,  
3 all of which have been identified in discovery. But the point  
4 is: We have more that they are using than we can try under your  
5 order. That that -- there are more than nine that they are  
6 using that --

7           **THE COURT:** No, wait a minute, wait a minute. You agreed to  
8 the order.

9           **MR. JAFFE:** We're not disputing the order. I'm just saying  
10 that --

11           **THE COURT:** I don't want you saying that I'm somehow  
12 compelling you to give up on -- let's be clear. You -- didn't  
13 you agree that you would reduce it down to -- I think it was  
14 ten, wasn't it? Or was it nine?

15           **MR. GONZÁLEZ:** Less than ten.

16           **THE COURT:** Less than ten. All right, nine. Did you agree  
17 to that?

18           **MR. JAFFE:** The point that I'm making, Your Honor --

19           **THE COURT:** Say yes or no.

20           **MR. JAFFE:** We did agree to that, to get the trial date.

21           **THE COURT:** Okay.

22           **MR. JAFFE:** That's right. The point is there is no  
23 misstatement because I identified more trade secrets that  
24 they're using, and we had to narrow down to nine. There's just  
25 no misstatements there.

1           **THE COURT:** So there you go. He could have proven 20, I  
2 guess, if he had the chance. So there you go, Mr. González.  
3 Actually, live to -- you got rid of nine just by agreeing to an  
4 early trial date.

5           **MR. GONZÁLEZ:** Yeah. And Your Honor, by the way, maybe  
6 we're about to roll into it. But with respect to our motion to  
7 strike four of the nine, I believe we can argue that in public.  
8 I'm not going to say anything confidential. I'm going to say  
9 vague terms, like, like, like "sheets." "Drawings."

10          **THE COURT:** Well, I'm not going to rule on your letter brief  
11 right now, that asks for permission for a summary judgment. I  
12 had that point of clarification that I wanted, and that's it.  
13 And you need to get in your response to that précis --

14          **MR. JUDAH:** I do. I also want to clarify one point, that we  
15 are not agreeing to waive our rights to the other trade secrets.  
16 That is -- that is not what I intended to say, and that's not  
17 what we are saying, in terms of the other 121 trade secrets that  
18 we identified. I want to just make that --

19          **THE COURT:** I think you have. This is important to me.

20          **MR. JAFFE:** I understand that.

21          **THE COURT:** This is very important. If you want to have a  
22 trial on 121 trade secrets, it might be about 12 months from  
23 now.

24          **MR. JAFFE:** (Nods head)

25          **THE COURT:** You agreed to an early trial date, and agreed to

1 reduce it to nine in order to get there. And at least for  
2 purposes of this case, if you go forward, and win or lose, it  
3 doesn't matter, you're not going to come back and re-litigate it  
4 on Trade Secrets 10, 11, 12 and so forth.

5 Now, if we have a disagreement on that, then we have a  
6 serious problem.

7 **MR. JAFFE:** Understood. So the point I was making is we are  
8 under a court order to narrow to nine. I didn't want to make  
9 any sort of statement that we were waiving any sort of rights as  
10 to those other trade secrets.

11 **THE COURT:** You have waived those rights, to get this trial.  
12 In other words, the trial date that you want, the injunction  
13 that you want, we -- you can't have everything.

14 If you want 121, okay I'll give you that. We'll push this  
15 case out for a couple of years. They'll have their cars running  
16 on the street before you get to your trial date, because you're  
17 being greedy.

18 **MR. JAFFE:** One second, Your Honor.

19 (Off-the-Record discussion between counsel)

20 **MR. JAFFE:** We understand.

21 **THE COURT:** All right. We're going to need to go to the  
22 next item of business, which is motion to strike trade secret  
23 claims. But I guess this one we need to have the courtroom  
24 cleared. Is that right?

25 **MR. GONZÁLEZ:** I don't think so, Your Honor. I can argue

1 this without talking about any -- I intend to use words like  
2 "technical information" and "design schematics" in my argument,  
3 and the number of the secret.

4 **THE COURT:** Well, we'll see if we can do it that way.

5 Mr. Chatterjee, though, has arisen to say something.

6 **MR. CHATTERJEE:** Your Honor, just because we do have  
7 separate interests here, Otto Trucking, we also filed a motion  
8 to strike. I understand Your Honor's order on holding the  
9 damages disclosures in abeyance. There are some additional  
10 points I would like to raise. But I also recognize Your Honor  
11 has a finite schedule.

12 **THE COURT:** Give me an example of something you want to  
13 raise.

14 **MR. CHATTERJEE:** Sure. There are a couple of things,  
15 Your Honor.

16 One of the things that I wanted to raise is in our separate  
17 motion to strike, we identified their Rule 26 disclosures. One  
18 of the things that they identified in the Rule 26 disclosure  
19 when they talk about unjust enrichment is that all they're  
20 asking for is disgorgement of profits from unjust enrichment.

21 As to Otto Trucking, Otto Trucking has never made a profit.  
22 And if you look at what their interrogatory response is, they  
23 don't even talk about any of Otto Trucking's financials.

24 In addition to that, when they talk about reasonable  
25 royalty, in the initial disclosures, they agreed to assert

1 originally 122 trade secrets and I think they had three or four  
2 patent claims.

3 Rule 26, as Your Honor knows, requires a computation. What  
4 I would have expected in an appropriate Rule 26 disclosure is  
5 they would have identified each one of those trade secrets and  
6 each one of those patents, and provided what they thought it was  
7 worth, in a lost profits or reasonable royalty number. They  
8 didn't do that. Even today, they're not doing that.

9 **THE COURT:** You're rehashing what we have already went  
10 through. And I said I'm going to wait and see what the reports  
11 actually claim. And then all of these points that you want to  
12 make, we'll come back to them.

13 **MR. CHATTERJEE:** And that's fine, Your Honor. The one issue  
14 I did want to raise, and this is in our filing 942-1, with  
15 respect to Otto Trucking, there's one statement on Page 154, and  
16 this is the sum total of what they say specifically about Otto  
17 Trucking, although they kind of do some hand-waving about joint  
18 and several liability, separately (As read) :

19 "Otto Trucking is separately liable for damages with  
20 respect to its own use of Waymo's trade secrets,  
21 including through its subsidiary, Otto Transport,  
22 which currently operates trucks for the benefit of  
23 Uber's freight program."

24 That is the sum total of their damages disclosure with  
25 respect to Otto Trucking, specifically. That is not a

1 disclosure at all, Your Honor. That's just saying: We think we  
2 should get some damages.

3 **MS. BAILY:** Your Honor, that's just incorrect. Because we  
4 have a joint-and-several-liability theory. And so what Otto  
5 Trucking is trying to do again is basically trying to have a  
6 summary-judgment motion that they're not liable, they think that  
7 they're not liable. This is not summary-judgment briefing. It  
8 was a disguised summary-judgment motion, but we shouldn't get to  
9 this issue now.

10 **THE COURT:** All right. I'm going to postpone everything  
11 having to do with this until I see the damages reports. And so,  
12 all right. So, let's now go to the --

13 **MS. DUNN:** Your Honor --

14 **THE COURT:** -- motion regarding the trade secrets.

15 Yes.

16 **MS. DUNN:** I apologize. Ms. Dearborn raised one thing that  
17 we should put on the record that's relevant to the damages  
18 argument.

19 Do you want to do that?

20 **MS DEARBORN:** Yes.

21 **THE COURT:** Good morning, Ms. Dearborn.

22 **MS DEARBORN:** Good morning, Your Honor, Meredith Dearborn on  
23 behalf of Ottomoto.

24 Ms. Baily referred several times to a contention  
25 interrogatory. That's their response to Interrogatory No. 13.

1 I just want to make clear for the record when that was first  
2 served.

3 That was served on July 17, which is the day that their  
4 opposition to this motion was due. And it's obviously weeks  
5 after the June 21st deadline.

6 **THE COURT:** Is that the 24-page thing?

7 **MS DEARBORN:** Yes.

8 **THE COURT:** What day, again?

9 **MS DEARBORN:** July 17th.

10 **THE COURT:** Today is No. 16, so -- so that was a month ago.

11 **MS DEARBORN:** Yes.

12 **THE COURT:** Okay.

13 **MS. BAILY:** And before any businesspeople were deposed.

14 **THE COURT:** Great.

15 Now, okay, Mr. González, you get to argue in code words,  
16 trade secret motion.

17 **MR. JAFFE:** Your Honor, we would ask that this be done in  
18 closed session. This would be highly prejudicial, to be able to  
19 argue about the substance of these trade secrets in open court.

20 We think there's an extremely high risk that there could be  
21 some confidential information that could come out. And just to  
22 be able to respond and quote our trade secret list, without  
23 being able to do that, would be highly prejudicial to arguments.

24 **THE COURT:** Is this the last item on the agenda? I think it  
25 is.

1           **MR. GONZÁLEZ:** I believe so.

2           **THE COURT:** All right. I'm going to go with Waymo on this,  
3 and ask anyone -- everyone to leave the courtroom, please,  
4 unless you are lawyers, or unless you are signed on to the  
5 protective order.

6           And I hate to do this to you, but I have to do it.

7           (The courtroom was closed and sealed proceedings were held  
8 on the record, not included in this transcript)

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4 **CERTIFICATE OF REPORTER**

5 I, BELLE BALL, Official Reporter for the United States  
6 Court, Northern District of California, hereby certify that the  
7 foregoing is a correct transcript from the record of unsealed  
8 proceedings in the above-entitled matter.

9   
10

11 /s/ Belle Ball

12 Belle Ball, CSR 8785, CRR, RDR

13 Friday, August 18, 2017

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